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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 606

THE UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED DECEMBER 20, 1930

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INDEX

	Original	Print
Record from D. C. U. S., District of New Jersey	1	1
Docket entries	1	1
Indictment	2	2
Motion to quash	4	3
Minute entries	9	5, 6
Opinion, Clark, J.	11	6
Order quashing indictment	53	37
Petition for appeal and order allowing same	54	38
Assignments of error	55	38
Citation and service [omitted in printing]	56	39
Clerk's certificate [omitted in printing]	57	39
Statement of points to be relied upon and designation to print entire record	58	39

1 In United States District Court, District of New Jersey

THE UNITED STATES
vs.
WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY } No. 1856b

Docket entries

May	28,	1930	Indictment for transporting and possessing; &c.
"	"	"	W. J. H.—Bench warrant issued.
June	9	"	W. H. S.—Plea; not guilty with leave, &c.; ordered bail continued.
"	"	"	W. J. H.—Plea; not guilty with leave, &c.; ordered bail continued.
"	"	"	W. J. H.—Ordered bail fixed $1,500; ordered clerk take bail; recog. (32,005) drawn and filed.
Oct.	8	"	Indictment moved before Judge Clark as to both.
"	"	"	Ordered marshal empanel jury.
"	"	"	Ordered above jurors excused until Oct. 9, 1930, at 10.30 a. m.
"	9	"	Trial continued before Judge Clark.
"	"	"	W. H. S.—Retracted plea not guilty to move to quash & dismiss indictment.
"	"	"	W. J. H.—Retracted plea not guilty to move to quash & dismiss indictment.
"	"	"	Motion to quash and dismiss indictment (Clark) (filed), and argument thereon.
"	"	"	Ordered recess 1.40 to 2.45.
"	"	"	Decision reserved to be rendered Newark, Nov. 24, 1930.
"	"	"	Ordered term extended for this trial.
Dec.	16	"	Opinion (filed).
"	18	"	Order quashing indictment (Clark) (filed).
"	"	"	Assignment of errors (filed).
"	"	"	Petition for appeal from order quashing indictment. Order allowing same (filed) to U. S. Supreme Court.
"	"	"	Citation issued returnable Jan. 17, 1931.
"	"	"	Citation returned and filed (service acknowledged) and copy filed.

[Clerk's certificate to foregoing paper omitted in printing.]

2 In United States District Court

Indictment

Filed May 28, 1930

UNITED STATES OF AMERICA,
District of New Jersey, ss:

In the District Court of the United States of America in and for the District of New Jersey, at the April term thereof, A. D. 1930.

The grand jurors of the United States of America duly impaneled, sworn, and charged to inquire in and for the body of the said district of New Jersey, upon their oaths present,

That on or about the 3d day of March, A. D. 1930, on the Franklin Turnpike, near Smiths Mills, in the County of Passaic, in the State and District of New Jersey, and within the jurisdiction of this court, William H. Sprague and William J. Howey, did knowingly, unlawfully, and feloniously transport, in a certain automobile, to wit, a Graham-Dodge truck, fifty half barrels of beer, the same then and there being intoxicating liquor containing one-half of one per cent or more of alcohol by volume and being fit for use for beverage purposes, which said transportation was then and there prohibited and unlawful and in violation of section 3, Title II, of the act of Congress of October 28, 1919, known as the national prohibition act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

3 Count II

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on or about the 3d day of March, A. D. 1930, on the Franklin Turnpike, near Smiths Mills, in the County of Passaic, in the State and District of New Jersey and within the jurisdiction of this court, the said William H. Sprague and William J. Howey, did knowingly and unlawfully possess fifty half barrels of beer, the same then and there being intoxicating liquor containing one-half of one per cent or more of alcohol by volume and being fit for use for beverage purposes, which said possession was then and there prohibited and unlawful and in violation of section 3, Title II, of the act of Congress of October 28, 1919, known as the national prohibition act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

PHILIP FORMAN,
United States Attorney,
District of New Jersey.

[Clerk's Certificate to foregoing paper omitted in printing.]
[File endorsement omitted.]

4 In United States District Court

Motion to quash the indictment

Filed Oct. 9, 1930

Motion is made to quash the indictment found in the above-entitled case by the grand jurors of the United States of America, in the district of New Jersey at the April term of the United States District Court for the District of New Jersey, A. D. 1930, for the following reasons:

The indictment should be dismissed as its charges in its two counts are only that the defendants above-named, on or about March 30th, 1930, on the Franklin Turnpike, near Smith's Mills, in the County of Passaic, in the State and District of New Jersey, unlawfully transported in a motor truck and possessed a product of manufacture described as beer, in containers designated as half barrels, said product being intoxicating liquor containing one-half of one per cent or more of alcohol by volume, and being fit for use for beverage purposes, which acts of transportation and possession it is alleged were prohibited by and in violation of section 3, Title II, of the act of Congress of October 26, 1919, known as the national prohibition act. (U. S. C. A. Title 27, sec. 12.)

This act of Congress clearly exceeds the powers conferred upon the Government of the United States by the Constitution of the United States unless such power was additionally conferred by the ratification of the eighteenth amendment by the votes of State legislatures.

5 Any amendment to the Constitution of the United States which confers upon the Federal Government additional direct powers over the people or their rights must be adopted and ratified in accordance with the limitations of the Federal Constitution.

A distinction, believed to have been implicit in the Constitution as originally adopted, was by the tenth amendment made clear and express, between the powers which were reserved to the States, as such, and the powers which were reserved to the people themselves. This distinction is expressly declared in the tenth amendment. The final phrase of that amendment—"powers * * * reserved to the States respectively or to the people"—was adopted in order to make this distinction clear and express.

Rights and powers reserved to the States may be surrendered by the States themselves, and under the scheme of the Constitution the legislatures of the several States are the proper agents to act for the States, respectively.

Powers or rights reserved to the people can be surrendered only by the people, and they act in such cases only in their constitutional conventions assembled in their several States.

In the selection of the method of ratification Congress itself is bound by these limitations.

This was the meaning of Article V of the Constitution as originally adopted as understood, intended, and declared by many of the framers of the Constitution.

When doubt arose whether Article V, taken by itself might not sometime be construed to confer on legislatures the power to surrender rights of the people and to extend the national governmental control over the people and their rights, they agreed to pass
6 and did pass the tenth amendment to make that construction forever impossible, to fortify the characteristic rights of freemen impregnably, and to reserve forever to the people themselves, alone, the power to grant to the National Government further governmental powers over themselves or their rights.

The tenth amendment was framed and adopted to put this question finally at rest, to remove all possible doubts, and to leave to Congress only the ministerial duty of submitting a proposed amendment to the bodies possessing the actual reserved power to grant the particular new governmental power sought.

Legislatures can thus ratify amendments surrendering rights or yielding powers belonging to the States.

Only the people themselves in constitutional conventions assembled in their several States can grant to the National Government the right or lawful power to exercise a new power over themselves or their rights, or yield any portion of the freedom of the people from governmental control.

By the tenth amendment the power of Congress to designate to which class of bodies a proposed amendment should be submitted, was clearly made ministerial only, the validity of its selection to be dependent on the nature of the new grant sought, and on the body to which was thereby expressly reserved the power to make such grant—to submit to the State legislatures amendments granting added powers over the States, or yielding State rights or powers; and to submit to conventions of the people amendments granting added powers over the people or their rights.

Any attempt of State legislatures to confer on the National Government additional direct powers over the people is attempted usurpation of the powers specifically and expressly
7 reserved to the people by the tenth amendment, and an invasion of their rights.

No amendment granting to the National Government an additional power or right to interfere with or regulate the rights and lives of the people themselves can be validly ratified save by the people themselves assembled in constitutional conventions in their several States.

From the beginning it has been the law and has been universally recognized that State legislatures are not representatives of the people authorized to grant away the rights of the people. And,

under the tenth amendment, they possess no such power to act for the people.

Hence the eighteenth amendment is as yet invalid, never having been ratified by the only bodies which, under the fifth article and the tenth amendment, possess the reserved power to grant to the National Government additional governmental powers over the people or their rights.

As, at the time of forming the more perfect union, in order to create a Nation out of the peoples of the different States, it was agreed, as a condition essential to such union, that propositions agreed to by the people of three-quarters of the States, in conventions assembled, should have binding force on all the people, powers "reserved to the people" can be exercised only by the people in constitutional conventions regularly assembled in their several States to pass upon a specific amendment submitted to them, but their affirmative vote in three-fourths of the States will give validity to the proposed amendment and make it binding upon all.

The point thus presented has not been argued to, or considered or decided by the Supreme Court of the United States or any
8 other appellate tribunal and presents a new question open to the consideration of this court.

The validity of no other amendment is involved, as no other amendment has ever attempted to give the National Government added direct powers over the people or their rights. Consequently no decision or practice based on any other amendment affords any precedent contrary to our contentions.

For these reasons we move to quash the indictment.

FREDERIC M. P. PEARSE,
Attorney of Defendants.

[Clerk's certificate to foregoing paper omitted in printing.]

9 In United States District Court

(Title omitted.)

Minute entries

TRENTON, *Oct. 8, 1930.*

Trial of W. S. and W. H. before Honorable William Clark.

Appearances: John Grimshaw, jr., for Gov., F. M. P. Pearse, for defendants.

Ord. marshal empanel a jury: Wm. Hardifer, J. Van Dyke Perrine, Walter D. Clayton, Chas. L. Heath, Howard P. Fell, Matthew F. Reynolds, Wm. W. Feather, Frank S. Davis, John T. Ray, Jos. A. Friskie, John O'Hearn, Don C. Kite.

Ord. above jurors ex. until Oct. 9, at 10.30 a. m.

[Clerk's certificate in foregoing paper omitted in printing.]

[File endorsement omitted.]

10 *Minute entries*

TRENTON, *Oct. 9, 1930.*

(Title omitted.)

Trial continued before Honorable William Clark.

Appearances: Phillip Forman and John Grimshaw, Jr., for Government; F. M. P. Pearse, Seldon Bacon, Julius Henry Cohen, Daniel F. Cohalan, for defendants.

WHS—Ret N. G. to move to quash & dismiss ind.

WJH— " " " " " " " " "

Argument on motion to quash and dismiss ind. (Clark.)

Mr. Pearse heard for motions.

Mr. Cohen " " "

Mr. Bacon " " "

Ord. jurors ex. until 2.00 p. m. to-day.

Ord. recess 1.40 to 2.45.

Ord.—these jurors be excused until Oct. 15 at 10.30 a. m.

Mr. Forman heard for Government.

Mr. Cohalan " " "

Decision reserved—to be rendered wk. Nov. 24th, 1930.

Ord. Term extended for this trial.

Ord. these jurors ex. until sent for.

11 In United States District Court District of New Jersey

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY, DEFENDANTS.

Hon. Phillip Forman, United States attorney, for plaintiff: Frederick M. P. Pearse, Esq., of Newark, N. J., attorney for defendants; Selden Bacon, Esq., Hon. Daniel F. Cohalan, Hon. Julius Henry Cohen, all of New York, N. Y., of counsel for defendants.

Opinion

CLARK, district judge: The traditional method of adopting amendments to the United States Constitution is challenged. Upon the outcome of that challenge depends the disposition of the case at bar. Even if this opinion meets with a cold reception in the appellate courts, we hope that it will at least have the effect of focusing the country's thought upon the neglected method of considering constitutional amendments in conventions. We have often wished for some statute kin to that of mortmain to remove the dead hand of tradition from the domain of ideas. As is familiar, all amendments so far made part of our constitutional structure, have been proposed by Congress for ratification "by the legislatures of three-fourths of the several States." This accustomed procedure has left unnoticed in article 5 of the Constitution the companion provision for ratifica-

tion, "or by conventions in three-fourths thereof." This language is now being lifted from its obscurity by the claim that a
12 lack of compliance therewith has invalidated the ratification of the 18th amendment, upon which the present indictment depends.

At the outset, the court wishes to disavow, for itself at least, any credit or discredit, as the case may be, for the change in emphasis to be accorded the phrasing of article 5. It cannot speak for counsel, as the following quotations are not to be found in their brief. The human mind is stimulated to inventive thought by particular needs; hence Poor Richard's homely proverb. It is not surprising, then, to find the contention of the counsel in the case at bar first appearing in the congressional debates on the proposal of the amendments ensuing upon the conclusion of the War between the States. So exactly has Senator Dixon, of Connecticut, anticipated the gist of our present argument in his discussion of the 14th amendment that we quote from his speech as reported in the Congressional Globe for January 29, 1869 (3d session, 40th Cong., p. 706) at some length:

"It has been said that the proposition is to deprive the people of the respective States of this power of controlling the right of suffrage within their own limits by their own consent, and that therefore their rights are not interfered with. How by their consent? Technically or in fact? I admit that technically this question is proposed to be submitted to the people of this country, but is it in point of fact? Is there any real submission? * * * Would it be fair to submit a question of this character to the present Legislature of the State of Ohio? You would not think so if every legislature had the same sentiments and had been elected a year and a half ago, and was still in existence. I ask any Senator whether it could be said that a legislature with those sentiments thus elected upon other issues was a fair tribunal to express the sentiments of the people of that State upon a question of this character? * * * It may even be said that the Legislature of the State of Ohio was chosen with more reference to this question than the legislatures of other States, because when that legislature was chosen the question was pending before the people of the State, and the people actually voted down the proposition by a majority of nearly fifty thousand votes. But notwithstanding that fact, which shows that the subject was under consideration, I will say that I cannot as a Senator declare
13 that I believe it would be fair to submit a proposition of this character to the legislatures of all the States having the same views as the Legislature of Ohio, chosen a year and a half ago. That, sir, is what you propose to do, because it happens that the legislatures are in favor of your proposition. Would you do it if they were against it?

"A word further as to the question whether this is a submission to the people. When the Constitution was formed provision was made that amendments to it might be submitted to the legislatures or to

conventions in the various States. Of course the intention was that Congress should select and judge as between these forms of submission; but can any man suppose that at that period in the history of our country it was ever supposed that questions of amendments to the Constitution would come to be party questions, submitted with party views, and to a party majority? I do not reproach anybody that that should now be the fact. It is, perhaps, a necessity of the case, and cannot well be otherwise; but when the Constitution was formed there was probably no anticipation of such a state of things, and therefore when it was proposed to submit questions of amendment to legislatures or conventions the meaning and intent was that the people should have an opportunity to act, that they should at least have an opportunity to elect those legislatures or those conventions with reference to the consideration of the proposed amendments.

"But suppose you now say that this question shall be considered by the legislatures of the States, and not by conventions. Then, from the very necessity of the case, you must place it before bodies actually chosen by the people before the question was presented. It is impossible, in my judgment, for Congress by any particular phraseology of their submission of the proposition, to prevent an existing legislature from acting on a question submitted. The Legislature of Ohio chosen two years ago, if this subject is submitted before they go out of existence, have a right to act on it. The Legislature of Connecticut now existing, if the proposition were submitted in season, might be called together by the governor and act upon it. You cannot prevent it. Therefore, it seems to me that it is absolutely essential, in order to get the action of the people on this question, that it should be submitted to bodies to be elected by themselves subsequently, to wit, conventions, because you cannot control the question of submission to the legislatures."

We find another echo of it in one of President Johnson's 14 messages of those years.

"Nor have the sovereign people of the Nation been afforded an opportunity of expressing their views upon the important questions which the amendment involves. Grave doubts, therefore, may naturally and justly arise as to whether the action of Congress is in harmony with the sentiments of the people, and whether State legislatures, elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment," Message of June 22, 1866. Richardson, Messages and Papers of the Presidents (1789-1897), Vol. VI, p. 391.

Coming now to our own times and the 18th amendment, an examination of a series of articles appearing in various legal periodicals in the year 1920 discloses a parallel line of reasoning. We quote from two:

"And it will also be conceded that even though the State legislatures of fifty years ago had no right, power, or authority, under Article V, to adopt such amendments as these so-called war amend-

ments—such power not having been delegated to those legislatures by the people, in adopting Article V—nevertheless, if after these so-called war amendments were thus adopted the people had assembled in convention, either in one national convention or in separate conventions held in each State, and ratified that action of the State legislatures, the validity of these amendments would have been put beyond question." Marbury, The Limitations Upon the Amending Power, 33 Harv. L. Rev. 232.

"* * * third, that such consent (i. e. to the 18th amendment) can not be given by the legislatures of the States, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the States respectively." White, Is There an Eighteenth Amendment? 5 Cornell Law Quarterly, 80; reprinted 54 Am. Law Rev., 245, at 246.

and at page 261:

"Such of the sovereign powers as were originally surrendered by the States to the United States were, therefore, so surrendered, not by the States as sovereignties acting through their legislatures, but by the people of the several States acting in the only way in which they can act, by conventions. If, in order to delegate to the United States, those powers which were delegated by the Constitution it was necessary that the people as such should act in the matter and they did so act, equally is it necessary, in order to surrender other powers 'not delegated to the United States by the Constitution,' but 'reserved to the States respectively or to the people,' that the people should act in the same formal and specific manner." Ibid.

See also

Intrinsic Limitations on the Power of Constitutional Amendment, by Skinner; 18 Mich. Law Rev. 213.

Inalienable Rights and the Eighteenth Amendment, by Abbott; 20 Col. Law Rev. 186.

Is the Eighteenth Amendment Void Because of its Contents? by McGovney; 20 Col. Law Rev. 499.

It must be confessed that the learned authors of these brochures propound our present theory rather by way of incidental suggestion than with any desire to follow it to its ultimate conclusions. In fact, they become enmeshed in a consideration of the constitutionality of the substance of the amendment.

We also are concerned with the substance or subject matter of the 18th amendment; but our interest is not intrinsic and per se. It lies only in the relation between that substance or subject matter and the manner of its adoption. This distinction is important perhaps from the point of view of the justiciable character of the question and certainly with reference to the doctrine of stare decisis. It is clear that a court's investigation as to whether the procedure prescribed for adoption of an amendment has been legally followed in the adoption of a constitutional amendment is one thing, and a similar investigation into the legality of the Government of which

the court is a branch is quite another. Consideration of amendments from the angle of their permissibility under an existing constitutional system must lead to the court's being the final arbiter of the form of government under which they function. Until the so-called national prohibition cases (Rhode Island v. Palmer, Feigenspan v. Bodine, etc., 253 U. S. 350 (1920), there had been only one case in the United States Supreme Court (Hollingsworth v. Virginia (1798), 3 Dallas, 378) wherein an amendment to the Constitution (the 11th) had been drawn in question. There, as here, only the procedure (failure of the President to sign the resolution) was
16 objected to. In 1849 the events arising out of Dorr's rebellion in Rhode Island (for an interesting account of this "most remarkable struggle for constitutional government in our history," see McMaster, History of the United States, vol. 7, p. 165, et sequtur), brought before the Supreme Court of the United States in the case of Luther v. Borden (1848), 7 Howard, 1, rights dependent upon the validity of various constitutions of that State. Chief Justice Taney in a dictum (the merits of the case turned on the right of the President to call out the militia) declared the question to be a political one. (One might pause to observe that Taney's propensity for dicta finally ended in the tragedy of the Dred Scott case.) This dictum was widely followed in the State courts. These decisions are collected in an article in 11 Minn. Law Rev., page 369, entitled, "Federal Amending Power, Genesis, and *Justiciability*."

An excellent illustration of the distinction we are seeking to make is to be found in two cases arising in New Jersey. In the first of these Dorr v. Secretary of State, 61 N. J. Law, 269, the phrase "majority of voters" in the amending clause [illegible] and the lottery amendment found to have been [illegible] with. In Carpenter v. Cassidy, 63 N. J. Law, 254, [illegible] on the other hand, the constitution of 1844 of that State was attacked on the ground that women had not been permitted to vote for the delegates whose deliberations had resulted in its submission to the male voters. Mr. Justice Swayze, speaking for the court of appeals, pointed out that the courts do not undertake to determine so fundamental a political question as the existence of the government they serve.

No constitution, Federal or otherwise, was attacked in the Federal courts from the time of the dictum of Luther v. Borden, until the argument of the national prohibition cases. There those arguing for validity contended that the issues were not judicially [illegible]. We agree with Professor Ilsley that the statements in the briefs regarding this point are not always clear
17 and confuse adoption and existence. Amending the Constitution, W. J. Ilsley, 31 Yale Law Jour., 637. However, the ultimate decision of the case, instead of its dismissal for want of jurisdiction, would seem to establish the doctrine that the existence of an amendment and therefore, of course, of an entirely new constitution, might have to conform to the particular theories of political science

sociology, economics, etc., held by the current judicial branch of the Government.

This court has never been especially impressed with the theory, stare decisis et non quieta movere. It is too often invoked as an agreeable substitute for mental effort. A chief justice of Georgia once remarked that courts of last resort lived by correcting the errors of others and adhering to their own. The leading writer on the question has laid down what seems to us the sensible rule. Chamberlain, Stare Decisis, at p. 19:

"The degree of authority belonging to such a precedent depends, of necessity, on its agreement with the spirit of the times or the judgment of subsequent tribunals upon its correctness as a statement of the existing or actual law, and the compulsion or exigency of the doctrine is, in the last analysis, moral and intellectual, rather than arbitrary or inflexible."

Moreover, Chief Justice Moschzisker, of Pennsylvania, in an article published in 1924 points out that the rule should not be applied with "undue severity" in constitutional cases. Stare Decisis in Courts of Last Resort, 37 Harv. L. Rev. 409, 420. The Supreme Court of the United States has taken much the same position. Famous examples are the different views expressed on the citizenship of a corporation under the diversity clause (Bank v. Deveraux, 5 Cranch, 61 (1807), Louisville R. Co. v. Letson (1844), 2 How. 497, on the Great Lakes as navigable waters under the commerce clause (The Thomas Jefferson (1825), 10 Wheaton, 428, and The Genesee Chief (1851), 12 How. 443, 451); the legal tender (Hepburn v. Griswold (1869), 8 Wall. 603, and legal tender cases (1870), 12 Wall. 457, 553); and income tax cases under the borrowing and taxing powers (Hylton v. United States (1796), 3 Dall. 171, and Pollock v. Farmers' Loan & Trust Co. (1894), 158 U. S. 601); and, finally, the reasonableness of hours of labor legislation under the due process clause (Lochner v. New York (1904), 198 U. S. 45, and Bunting v. Oregon (1917), 243 U. S. 426). Justice Brandeis, with his usual industry and ability, has made a collection of additional instances of such "about faces" in his opinion in State of Washington v. Dawson (1924), 264 U. S. 219. A careful examination of the arguments (both oral and written) of counsel in the national prohibition cases in the light of the findings of the court (for in such original form were the cases decided) makes it plain that no such course will be imposed upon them in the decision of the case at bar. For convenience, the findings of the national prohibition cases above referred to essential to the present discussion are set forth below.

"1. The prohibition of the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, as embodied in the 18th amendment, is within the power to amend reserved by article 5 of the Constitution.

"5. That amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument." Findings 4 and 5; 253 U. S. 350, 386.

Counsel for the breweries attacked the substance or subject matter of the 18th amendment on three grounds, the first, viz, that the word "Amendment" as used in article 5 did not include "alteration"; second, that the amendment was in effect legislation; and third, and principally, Messrs. Root, Bullitt, and Mayer argued that either because of the 10th amendment or because of the nature of the Federal system, or because of both, constitutional amendments changing the distribution of powers as between the States and United States, and by so doing reducing the State's police power, are forbidden. Manifestly, they proceed on assumptions entirely foreign to the present controversy. We can not stop to discuss the merits of these final arguments. The first two are fully discussed and effectively answered both in the present Chief Justice's brief in the national prohibition cases (Vol. 108, New York Bar Assn. U. S. Supreme Court Briefs) and in Professor Dodd's article, "Amending the Constitution," above quoted. As to the third contention of Messrs. Root et al., we perhaps need only quote from those two distinguished lawyers, Professors McBain and F. J. Stimson:

"Let it be conceded that the good people of 1789 would have been horrified at any such invasion of State powers, although, incidentally, they would probably have regarded State prohibition as almost equally horrendous. Even so, how could it be rationally argued that by the ninth and tenth amendments they intended to make the division of powers between the Nation and the States static throughout eternity—so static indeed that it could not be changed even by the difficult process of amending the constitution?" McBain, Prohibition Legal and Illegal, p. 61.

"Such an event to their fancies would make the framers turn in their graves. Never for one moment did the idea occur to them that the 5th article of the Constitution providing for its future amendment might open the door to the destruction of all the principles by changes sacrificing those elemental rights which they all believed no government might take away and which they had fought the Revolution to secure; by amendments qualitative or what I have termed substantive in nature, controlling or overruling those very rights which it was framed to protect, and losing sight of their own vision that this Constitution was being made to protect the people from their government even as to those essential human liberties, never to further bind them, albeit it had a majority behind it.

"Yet the Constitution can not rise above the Constitution and it is by its own terms subject to amendment, save the provisions protecting slave importation and forbidding direct Federal taxation before 1808 and always the equal representation of States in the Senate." Stimson, the American Constitution and Protecto Private Rights, p. 218.

It is to be noticed that finding 5 of the national prohibition cases above cited included the word "ratification." In the two cases of Hawke v. Smith (1920), 243 U. S. 221, and Leser v. Garnett (1922), 258, U. S. 130, the United States Supreme Court passed upon the question of ratification of the 18th and 19th amendments, respectively. An analysis of the briefs in the national prohibition cases and of the facts in the two last-named cases demonstrated that the only question at issue therein was the meaning of the word "legislature" as used in article 5. One side contended that it meant a depository of legislative power—i. e., the people—and the other, that it was used in what might be termed "its trade meaning"—i. e., a representative law making body. The Supreme Court in both cases agreed with the latter view and held the referendum provisions of a State inappropriate to the ratification of a constitutional amendment. These decisions (in one of which he later participated as Chief Justice) of the highest court had been foreshadowed in an article by the late Professor Taft in an article entitled, "Can Ratification of an Amendment to the Constitution be Made to Depend on a Referendum" wherein the previous conflicting State authorities are reviewed and discussed. Neither by holding nor by extraneous discussion did these cases assume to deal with the ratification of amendments by conventions—the second of the three conceivable methods. The late Chief Justice emphasizes this in the form of his argument in favor of the construction ultimately adopted by the Supreme Court.

"That it was the intention to submit the ratification to the popular representative bodies named, and not to their constituencies, is clearly shown by the alternative for the State legislatures which under the article Congress may in its discretion substitute as the ratifying agencies. These are conventions in the States called for the purpose. These are the same kind of representative bodies which adopted the Constitution and exclude necessarily any idea of further submission to the people directly of the proposed amendment.

"This, too, disposes of the argument adopted by the Washington and Ohio courts, that the word 'legislatures' means the law making power of the State, for certainly a convention called for the purpose of ratifying an amendment is not part of the law making power of the State. * * *

"If proposal or ratification were mere law making, then under section 7, Article I, action of the two Houses of Congress must be submitted to the President for his approval or disapproval. Yet in Hollingsworth v. Virginia it was held that a proposal by two-thirds of both Houses was sufficient under the article without submitting it to the President for his approval or disapproval, and this view has been confirmed by the practice since and by express resolutions of the Senate." 29 Yale Law Journal, 824.

21 As a matter of fact, though neither counsel has seen fit to furnish the court with a reference thereto, the utterance of the Supreme Court most damaging to the theory that ratification of

the 18th amendment by conventions is necessary for its validity is to be found in the case of Dillon v. Gloss (1921), 256 U. S. 368, wherein Mr. Justice Van Devanter says, at page 374:

"Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by those assemblies in three-fourths of the States shall be taken as the decisive expression of the people's will and be binding on all."

It must be noted, however, that the learned justice was only passing upon the power of Congress in proposing an amendment to the Federal Constitution to fix a definite period for ratification by the States. This question is also discussed in Professor Dodd's article above cited, at page 146, and in an article published in 14 Va. Law Rev. entitled "Can a State Prescribe a Breathing Spell Before Its Legislature Acts Upon a Proposed Amendment to the Federal Constitution?" at page 191, where it is pointed out that the seven-year provision did not harm the petitioners. The remarks of the learned Justice would seem, therefore, to be a decided "hair-trigger" decision.

Limitations of both space and capacity prevent our offering upon any extended discussion of the questions involving a federal system. Certain considerations must, however, be given to the nature of constitutional amendment that they should be kept clearly in mind. If States could in the general welfare clause of the Federal Constitution [illegible] integrate their terms of reference [illegible] personal [illegible] they may do so by means of the [illegible] If they choose the former, their [illegible] of the latter, federation, [illegible] [illegible]

[illegible] State is a political unit [illegible] and [illegible] with the exception of [illegible] [illegible] [illegible] Federal organization and the [illegible] [illegible] [illegible]

without some special means being adopted for discovering the views of the constituent members." Strong, p. 61. Fortunately, the constitutional growth in the Colonies furnished ample precedent for the required type prior to 1787. The Mayflower Company, John Robinson Scruby Congregation at Plymouth, and the Fundamental Orders of Connecticut of 1639 are familiar examples of early colonial agreements for government. See Thorpe, Charters, Constitutions, and Organic Laws, p. 519; David, John Robinson (1903), p. 48. Likewise, the "Agreement of the People," granted by the Council of the Army in 1647, was in fact a draft constitution for the Commonwealth under Cromwell. Dunning, Political Theories, p. 238. These documents and some of the later and more complete frames of government did not contemplate any change and therefore provided no method for their own amendment (see the constitutions of South Carolina (Thorpe, p. 3244), Virginia (p. 3812), New Jersey (p. 2594), New Hampshire (p. 2451), New York (p. 2623), and North Carolina (p. 3081)). Hoar, Constitutional Conventions, p. 8. They were, of course, rigid as that term is used by Viscount Bryce. Even when the necessity for providing for alteration became apparent and amending clauses were included, the element of rigidity was preserved. The constitutions were not permitted to become flexible. As Bryce defines the difference, the amending powers in the former type of constitution must be exercised in a manner separate and distinct from that provided for ordinary legislation. Bryce, Studies in History and Jurisprudence, pp. 90, et seq. Hoar has summarized the constitutions of the American States prior to 1787 as follows:

"Six of the early constitutions, and the rejected Massachusetts constitution of 1778, provided no method for their own amendment. (See above.)

"Of the eight constitutions which did provide for amendment [illegible] provided for legislative action (or a similar [illegible] and more difficult [illegible] than the passage of a mere statute), [illegible] Maryland, Thorpe, p. 1686, Delaware, p. 566, and South Carolina (1778), p. 3246), two provided for submission by a council of censors [illegible] by a specially called convention (Pennsylvania, p. 3092, and Vermont, p. 3742), one provided for a convention called by petition (Georgia, p. 777), and one for a convention called by a popular vote of a certain kind (Massachusetts, p. 1909). (An additional [illegible] p. 8.

The provisions of the Pennsylvania constitution of 1776 [illegible] the Pennsylvania frame of government of 1696, William Penn's Charter of Privileges of 1701 (Thorpe, p. 3081), was the first American governmental framework which contained the principle of rigidity [illegible] requiring the consent of the governor for the time being or one [illegible] of three of the councils for an amendment; so early as [illegible] in the system of article V of the Federal Constitution to [illegible] its inclusion.

"The said council of censors shall have also power to call a convention to meet within two years after their sitting, if there appear to them an absolute necessity for amending any article of the constitution which may be defective, explaining such as may be thought not clearly expressed, and of adding such as are necessary for the preservation of the rights and happiness of the people: but such articles as are proposed to be amended shall be promulgated six months before the day appointed for the election of such convention, for the previous consideration of the people that they may have an opportunity of instructing their delegates on the subject." Thorpe, p. 3092.

The thirteenth and fifteenth of Randolph's original resolutions, submitted on May 29 to the Constitutional Convention of 1787, read as follows:

24 "13. 'Resolved, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

"15. 'Resolved, that the amendments which shall be offered to the Confederation, by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon.'" Scott, Madison's Journal, p. 63.

On June 5 and June 11 there was some discussion in the committee of the whole as to the necessity of such a division. (Journal, p. 110, 149.) The committee, and finally the convention, on July 23 accepted the resolution, with the exception of the clause requiring the assent of the National Legislature. (P. 409.) The committee of detail, in a Constitution reported on August 6, for the first time made provision as to the manner in which amendments should be proposed, in article 19, which read:

"On the application of the Legislatures of two thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a Convention for that purpose." Warren, The Making of the Constitution, p. 674; Journal, p. 641.

This proposed article was debated on September 10. (Journal, p. 692.) On that day Hamilton suggested that the National Legislature, as it will be the first to perceive the most sensible of amendments ought also to be empowered, with the concurrence of each branch, to call a convention. Madison thought the article vague. It did not, in fact, make clear whether the legislatures were to propose the amendments and the convention was to adopt them, or whether the conventions were to both propose and adopt them, or only propose them for adoption by some other body or bodies not specified. Gerry objected that two-thirds of the States may obtain a convention, a majority of which can bind the Union to innova-

tions that may subvert the State constitution altogether. He and Sherman, accordingly, moved to add to the article the words,
25 "or the legislature may propose amendments to the several States for their approbation, but no amendments shall be binding until consented to by the several States." (Journal, p. 693.) This was finally agreed to, with the inclusion of the numerical qualification "three fourths of" before "the States," submitted by Wilson. (Journal, p. 693.) Madison then proposed a substitute, which, with the convention method of proposing amendments suggested by Morris, finally became article 5 of the Constitution, which reads as follows:

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

The significance, for our purposes, of these proceedings lies, first, in their exclusion of the National Legislature from the original resolution of Randolph and from the initiation of the call for a convention in article 19 of the committee of detail's report, secondly, in the insistence upon the approbation of the several States, and third in the use of a convention both in article 19, above cited, in Hamilton's substitute, and in Morris' amendment thereto.

The stereotyped method of constitutional interpretation and or construction is summed up by Mr. Justice Holmes in a very recent opinion, Ohio v. Agler (1929), 280 U. S. 379, wherein he said:

"The language, so far as it affects the present case, is pretty sweeping, but, like all language, it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." p. 383; and went on to decide that "all," the acme of inclusion, did not include divorce cases affecting consuls, within the meaning of the third article. Counsel have accordingly laid before us an elaborate and brilliant argument based, first on a "tired eyed" scrutiny of the Constitution as a document, and
26 second, on a study of its historical and political background.

Any express limitation of the language of article 5 must be sought in some reservation. The only defeasance in the grant of the Constitution is found in the tenth amendment. Counsel have placed the two provisions in combination and have argued that the result justifies their thesis that any amendment granting governmental powers over the people to the United States must be submitted to conventions, instead of to State legislatures.

The historical background of the first ten amendments to the Constitution is too well-known to require detailed repetition here.

Barron v. Baltimore (1831), 7 Peters, 243, at 250. The State constitutions enacted prior to 1787 included various provisions borrowed from the English Bill of Rights (1689). Macaulay, History of England, vol. 3, p. 400. In the ratifying conventions in the larger States much was made by the opponents of the Constitution of the omission to include similar provisions therein. The Federalists finally secured a favorable vote by the promise that the first Congress would remedy these defects. Included with the amendments guarding against personal oppression were two—the 9th and 10th—prompted by the desire to safeguard the smaller governmental units from oppression by the larger. The 10th amendment reads as follows:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is interesting to students of constitutional law to observe that the identical language appears as section 107 of the Australian Constitution, and that problems similar in scope to our own have been recently agitating the courts of Australia and the Privy Council in England. Constitutional Relations, W. A. Hallman: Law Quarterly, No. 46, p. 184; Attorney General v. Colonial Sugar Co., 1914 Appeal Cases, p. 237. In Canada, on the other hand, what Viscount Bryce calls "the unallotted residue of powers" remains with the Federal Government, rather than with the various Provinces. See Political and Provincial Taxation in Canada, chapter on the
27 Growth of the Canadian Constitution: 28 Columbia University Studies.

We have seen that the circumstance which gives a constitution rigidity within the definition of Viscount Bryce lies in its amendment in a manner different from that followed in the enactment of legislation. Such difference may be evinced in several ways: The change may be formulated by an abandonment of the majority principle in favor of some greater proportion. This was the case in the early charter granted by William Penn to his colonists and in the constitutions of the two Carolinas and Georgia. The purpose of these differences being in the direction of greater difficulty and therefore greater deliberation, it is not surprising to find a requirement that in addition to formulation there also be approval or ratification. This second step in the process could be and sometimes was assigned to the same governmental body that had been engaged in the original formulation. On the other hand, it might be assigned to one of the other elements that go to make up the body politic, most often, of course, to the people who originally submitted themselves to the particular frame of government it is sought to change. Because a federal government is only one step beyond an alliance, and because, therefore, its fundamental instrument partakes of the character of a treaty, although possible, it would be curious if the power of approval of changes therein was not accorded in some way to the orignal and component units. The submission for approval of an already

formulated amendment requires as a condition precedent a proposal. Thus, we have three steps—formulation, proposal, and approval. This is the procedure prescribed in the amending clauses of the early constitutions of Vermont, New Hampshire, Massachusetts, and Pennsylvania, and of the United States.

We do not need the somewhat elaborate argument based upon the addition of the words "United States" to the 10th amendment by Roger Sherman, of Connecticut (1 Annals of Congress, 768), to aid us in holding that the power to amend is not delegated to the United States. In terms, the power of proposal alone is assigned to Congress, and therefore, so delegated. The power of formulating
28 amendments (the word "propose" seems somewhat ineptly used in the first part of article 5) is assigned to two-thirds of both Houses of Congress or to a convention called on application of the legislatures of two-thirds of the several States. The power of approval is, on the other hand, lodged in the legislatures of or conventions in three-fourths of the several States. If, then, the power to amend is included within the reserved powers, the 10th amendment applies, and the reservation must be to the States, respectively, or to the people. Such a reservation is manifestly a nullity, if Congress is to have absolute and unlimited discretion in its exercise of the proposing power, as it can and always has placed the amendments before the legislatures and excluded the conventions. A division or limitation upon its discretion is therefore required. Counsel have made this division and limitation according to the "source," as they say, of the power granted by the amendment, and argue that a change granting governmental powers over the people must be ratified by conventions of the people.

In our judgment, this joint construction of article 5 and the 10th amendment is too strained to be permissible. It involves, we think, a misconception of the meaning of the terms "people" and "power." We quite agree with Professor Dunning that—

"On one fundamental question the formal pronouncements of the Americans were hardly more coherent and logical than the multitude of democratic theories that had preceded them. They furnished no precise conception of 'the people' or 'a people.' The term was used indiscriminately in the collective and in the distributive sense. No criterion was afforded by which the possessor of sovereignty or of rights could be identified." History of Political Theories: From Rousseau to Spencer, p. 97.

We can not, however, follow the argument that a convention is more within the definition of people than a State legislature. There may be several stages in the politico-scientific conception of the people in relation to their government. It may mean, for instance,
29 the mass of human beings in a geographical area, the electors, their agents for a special purpose, or their agents for general purposes. The non-freeholding males of Rhode Island and the women of New Jersey earnestly, though unsuccessfully, contended that they were "people" in the constitutional controversies

referred to earlier in this opinion. At any rate, both the convention, the special agent, and the legislature, the general agent, are clearly but different manifestations of the machinery of representation required by the inconvenience of direct action (an inconvenience greatly removed latterly by improvements in printing, postal service, and education; hence, the referendum). We have never before heard it contended that either one or the other is "the people." It would be most extraordinary, therefore, to argue that one should and the other should not be so classified. So Senator Hoar, in Constitutional Conventions, said:

"But in America the representative convention developed. It was a step as far beyond Runnymede as our constitutions were beyond Magna Charta." Page 2

And Congressman Luce, speaking of the ratification of the Federal Constitution:

"Had the decision been taken in the town meetings and at the county courts, it is altogether probable that the new Constitution would not have been adopted. Luckily the final word rested not with the people but with their representatives, gathered in State conventions." Legislative Principles, p. 630

In Judge Jameson's discussion of the various species of conventions, he lists the general assembly under the term "legislative convention." Jameson, Constitutional Conventions, p. 5. The 10th amendment does not read "the people in convention assembled" any more than it reads "the people by their legislative representatives," and we see no warrant for placing the one or the other abstract interpretation on the single noun.

In the second place, counsel seem to be talking about power (legal competence), when what they really mean is the application of power. In other words, they interpret the 10th amendment, to read:

"powers, whose application is to the people, are reserved to the people" rather than to the States. This we think to be historically untrue. One might imagine powers not delegated to a particular State Government at the time of the adoption of the Constitution; to give extreme examples, power to establish a State religion or to nationalize women. Such a power would be reserved to the people of that State. Our own view is that if the phrase "or to the people," added without explanation by Carroll, of Maryland (1 Annals of Congress, p. 761), had any meaning at all, which many political theorists doubt (Merriam, American Political Theories, p. 257), it has reference to such a case. We are aware that this theory would be disputed by those thinkers and jurists who consider the phrase signifies some power reserved to the people nationally. Turner v. Williams (1903), 194 U. S. 279, 295-296; Kansas v. Colorado (1916), 206 U. S. 46, 89-90.

The power to regulate the conduct of individuals for what is assumed to be the benefit of the general mass being to some extent the very purpose of association in government, it is certainly implicit in whatever authority is set up. It follows that this power, known

as the "police power," and described by Justice Holmes as "the general power of the legislature to make a part of the community uncomfortable by a change" (Tyson v. Banton (1927), 273 U. S. 418 at p. 446), was lodged in the thirteen States at the time of the adoption of the Constitution. The reservation of the 10th amendment must accordingly run to them.

We must reject, therefore, counsel's argument, based on their combination and subsequent interpretation of article 5 and the 10th amendment. We give, however, full weight to their development of the tacit assumptions drawn from both the historical and theoretical nature of our Federal system, although our development thereof does not altogether parallel that of their briefs.

The statements of publicists, and even of judges, reveal some confusion of thought on the subject of local self-government in a Federal as distinguished from an unitary State. They seem to assume that the problem is peculiar to the former style of government, whereas it is, of course, implicit and variously solved in all government. In a Federal State, however, its solution is achieved according to the nature of that State, by the rigid distribution of power between the subordinary or local and central or Federal authority. Any particular distribution is, of course, vitally effected by the theory and practice existing at the time of its origin or change. The writings (Federalist, Nos. 18, 19, and 20) and the speeches, both in and out of the convention, of those engaged in framing the Constitution, make it abundantly clear that the historical examples of attempted integration of separate communities with which they were familiar were the Greek leagues, the Swiss cantons, the Seven United Provinces of the Netherlands, and the German Bund. Freeman, in his History of Federal Government from the Foundation of the Achaian League to the Disruption of the United States (1863), it is library tradition that the result of the Civil War so disappointed the learned author that his opus stopped at volume 1), subdivides Federal Commonwealths into two classes. They are, first, the system of confederated States, where the central power deals with the State Governments only, and second, the Composite State, where the central power acts directly on all citizens. It is doubtful whether this classification would meet with approval of later writers on political science whom we have quoted heretofore. Nevertheless, it is plain that of the examples mentioned only the Achaian League came anywhere near fulfilling the latter condition. Freeman, p. 12; J. S. Mill, Representative Government, p. 301; Motley, The Rise of the Dutch Republic, vol. 3, p. 415. For, although Polybius shows that every Achaian citizen stood in a direct relation to the Federal authority and was in a strict sense a citizen of the league itself and not merely of the cities which composed it (Polybius, vol. 2, p. 371), we do not seem to know whether the Federal taxes were gathered by Federal tax collectors or merely requisitions apportioned by the cities themselves. (Vol. 4, p. 66.) Freeman seriously questions the scholarship of the framers and points

of what they usually termed their "Constitutions." The final form of the American argument against British pretensions was, therefore, by no means a happy idea suggested by the stress of contention, but was steadily based on ante-Revolutionary constitutional development." P. 401-402.

See also Jefferson's Summary View, 11 Jefferson's Writings, 258; Political Ideas of the American Revolution (1922) Adams, chapter 1 and 2; McIlwain, The American Revolution.

These views found such frequent expression in the Federalist and in the debates in the principal and ratifying conventions that we have printed a separate memorandum in which the language containing them is set forth. Most of those who spoke expressed a wholehearted dread of "consolidation," as they called it, and exhibited a firm determination to concede as little of the power of the individual States as was consistent with the breakdown in the previous confederation which had forced the calling of the convention and some change in the existing conditions of government. As instances we are including here a quotation from the Federalist, in No. 17 (two quotations each in the Federal and ratifying conventions, and two from the most famous of the opinions of Chief Justice Marshall.

"The regulation of the mere domestic police of a State appears to us to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation can never be desirable cares of a general jurisdiction." Federalist, p. 98.

Mr. Rutledge, of South Carolina, from the committee on detail, reported

"At the end of the sixteenth clause of the second section, seventh article, add, and to provide as may be necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the government of individual States in matters which respect only their internal police, or in which their individual sufficiency may be competent." Madison's Journal, p. 585.

And Mr. Sherman, of Connecticut, "thought it reasonable that the provision in favor of the States importing slaves should be extended, so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate." Journal, p. 737. And see his remarks to the same effect on page 361. He then put the motion (page 738), which was lost by a vote of eight to three, New Jersey, however, voting in favor of the motion.

It is perhaps not generally realized that a suggestion that Congress be given power to enact sumptuary laws was made at the Federal convention. Oliver Ellsworth, of Connecticut (afterwards Chief Justice, saying with respect thereto that "as far as the regulation of eating and drinking can be reasonable, it is provided for in the power of taxation." (Journal, p. 562) and Gerry, of Massachusetts, adding "the law of necessity is the best sumptuary law." The motion was lost by a vote of eight to three.

The same sentiments are portrayed in the ratifying conventions. So, James Monroe, in the Virginia convention:

"What are the powers which the Federal Government ought to have? I will draw the line between the powers necessary to be given to the Federal, and those which ought to be left to the State governments. To the former I would give control over the external affairs; to the latter I would leave the care of local matters."

Elliot's Debates, vol. 3, p. 214.

And to the same effect, Colonel Varnum in Massachusetts:

"After stating the difference between delegated power and the grant of all power, except in certain cases, the colonel proceeded to controvert the idea that this Constitution went to a consolidation of the Union. He said it was only a consolidation of strength, and that it was apparent Congress had no right to alter the internal relations of a State." Elliot, vol. 2, p. 78.

Finally, let us hear Chief Justice Marshall speaking in the famous case of McCulloch v. Maryland (1819), 4 Wheaton, 316, at pages 421 and 431:

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. . . .

"Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not."

The nuances of political theorists with respect to the doctrine of popular sovereignty are difficult to follow. To what extent the Constitution finally reflects them is also in dispute. We think that Walter Lippman correctly appraises the situation. He says, in Public Opinion (1922), p. 283:

"But though popular sovereignty was not clearly understood by anybody, it seemed to imply so great an enhancement of human life, that no constitution could stand which frankly denied it. The frank denials were therefore expunged from consciousness, and the document, which is on its face an honest example of limited constitutional democracy, was talked and thought about as an instrument for direct popular rule."

And see, Lecky, Democracy and Liberty, vol. 1, p. 55. This "talking and thinking" had an ample reservoir to draw from in the writings of those who were participating, with their pens at least, in the attempts to resist the oppressions of the Stuarts and the Hanoverians. As a matter of fact, the idea of popular sovereignty and

of a contract between governors and governed were outlined in Cicero's De Republica, Book 1, pp. 25, 26, 32, and Book 3, p. 13, and in Sir John Fortescue's De Laudibus Legem Angliae, pp. 9, 13, 14, and 18. The much more classical education of those days made the framers familiar with both such works.

36 The contact of the colonists with the events in the mother country preceding establishment of the protectorate (Macaulay, History of England, Vol. 1, pp. 113 to 135) was naturally particularly close, and it is not surprising to find them thoroughly conversant with the political literature of that period, including the pamphlets of Colonel Lilburne, above mentioned, of the Levellers and the more sober Milton, Harrington, Sydney and Locke. As Professor Dunning says, most of the catchwords of modern democracy are to be found in the pamphlets of the first named, e. g., "We, the people" (of the preamble of the Constitution) in the "Vox plebis." So, in Milton's Tenure of Kings and Magistrates (1649), in "Harrington's" The Commonwealth of Oceana (1656) (this work embodied a scheme for a constitution of Great Britain to be instituted by Cromwell), and Algernon Sydney's Discourses Concerning Government (1698), repeated references to the authority of the people appear. It is in Locke's Treatise of Civil Government [ ] that this doctrine finds most complete expression, and it is with Locke's work that the framers were most familiar and to which they made most frequent reference. So, we find in the Treatise, Book 2, Sec. 149, the following:

"The community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."

(Montesquieu, another favorite of the framers, manifested no interest in the idea of popular sovereignty, but devoted most of L'Esprit D'Lois to the theory of the separation of powers.) We have not overlooked, of course, Rousseau, and his American prototype, Thomas Paine. The former's doctrines indirectly affected the writings of the Englishmen we have referred to. The latter's violent hatred of monarchy, as evinced in his Common Sense, contributed to the general exaltation of the people.

The references to the people in the Convention Debates and in the early Supreme Court opinions are so numerous that here again we have prepared a separate memorandum setting them forth.

37 Practice undoubtedly lagged behind profession. The extent of this difference between ideal and reality varied in the different Colonies and early States, and is discussed in more detail than we can afford it in Professor Osborne's book above cited. And see also McKinley, The Suffrage Franchise in the Thirteen English Colonies, and Bishop's History of Elections in the American Colonies.

themselves, instead of only permitting them to take or reject propositions originated by others, not especially chosen for the purpose, and which might not be precisely such as they would wish to either accept or refuse. I understand a proposed amendment to the Constitution—which amendment, however, I have not seen—has passed Congress, to the effect that the Federal Government shall never interfere with the domestic institutions of the States, including that of persons held to service. To avoid misconstruction of what
40 I have said, I depart from my purpose not to speak of particular amendments so far as to say that, holding such a provision to now be implied constitutional law, I have no objection to its being made express and irrevocable." Richardson, Messages and Papers of the Presidents (1789–1897), Vol. VI, p. 10.

It is only fair to point out that in the first part of the above-quoted passage Mr. Lincoln was discussing the proposal of amendments and not their ratification. His argument applies, a fortiori, however, to the latter process.

We have tried in the preceding pages to do justice to what we have called the stereotyped method of constitutional interpretation. In spite of our conscientious efforts, we can not help a feeling of impatience at its unreality. We prefer to regard our frame of government as a problem in political science, to be solved as far as may be, according to scientific principles. The qualification "as far as may be" must be included because a written document imposes certain limitations upon any approach, scientific or otherwise. We quite agree with Professor Beard in his statement that "a search for 'the will of the people who made the Constitution' leads into a Servonian bog." The American Leviathan: The Republic in the Machine Age, p. 27.

We are encouraged to find that this same impatience appears also in the writings of those whose study of the Constitution has been infinitely more thorough and able than our own. So Professor Burgess, in his Political Science and Constitutional Law:

"There is a growing feeling among our jurists and publicists that, in the interpretation of the Constitution, we are not to be strictly held by the intentions of the framers, especially since the whole fabric of our State has been so changed by the results of rebellion and civil war. They are beginning to feel, and rightly too, that present conditions, relations, and requirements, should be the chief consideration, and that when the language of the Constitution will bear it, these should determine the interpretation." Vol. 1, pp. 153–154.

And Viscount Bryce, in his Studies in History and Jurisprudence:

"To this the Australians replied that the experience of the United States had shown that in constitutional questions it was sometimes right and necessary to have regard to the actual conditions and
41 needs of the nation; that constitutional questions were in so far political that where legal considerations were nearly bal-

anced, the view ought to be preferred which an enlightened regard for the welfare of the nation suggested." Vol. I, pp. 510–511.

And, finally, our own Justice Holmes:

"* * * when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism: it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." Missouri v. Holland (1920), 252 U. S. 416, 433.

Political science can give only one answer to the question presented by the alternative methods of ratification prescribed by article 5. If the amendment to be considered is one designed to transfer to the United States powers heretofore reserved to the States, or, if there are any such, to the people, that answer must be in favor of the convention method. This follows from the character of such amendments and from the character of the delegates to and deliberations in a constitutional convention, as compared with the corresponding character of the personnel of State legislatures and their deliberations. We hope that the fundamental nature of a transfer of additional power to the Federal Government has been made sufficiently plain by the previous exposition of our Federal system, with its shibboleths of local self-government and popular sovereignty.

We believe that much historical evidence could have been submitted touching the circumstances of the ratification of the various amendments to the Constitution. We can recall James Ford Rhodes' account of the ratification of the 14th and 15th amendments, the reentry into the Union of the seceding States being conditional upon such action on their part. Rhodes, History of the United States (1850–77), pp. 3 et seq., pp. 31 et seq. For a more minute
42 account of the same happening see Claude G. Bowers' The Tragic Era. Ida Husted Harper's monumental History of Women's Suffrage gives in volume 6 a detailed account of the ratification of the 19th amendment by the Tennessee Legislature. This resulted, in the last analysis, upon the change in the vote of a youthful legislator of that State, who very sensibly declared that he had always been in the habit of following the advice of his mother. One of the articles appended to the Senate hearings on the Wadsworth-Garret suggested amendment to the Constitution, of which more hereafter, states that the Missouri Legislature ratified the 18th amendment in fifteen minutes. Assn. of the Bar of the City of New York Pamphlets (1923), vol. 386.

Such evidence might have been accumulated. In its absence, however, we believe we are entitled to consider the opinions of experts on government, especially perhaps as their conclusions on this subject

would seem to be fairly obvious. If we proceed on the trusteeship theory of representation, the quality of the individuals in the ratifying body is important, since they are acting without instructions. Edmund Burke's famous Letter to the Sheriffs of Bristol; Bryce, Modern Democracies, vol. 2, p. 384. It is possible to obtain as delegates to a constitutional convention a higher grade of men than on the average fill the halls of our State legislatures. The reasons for the decline in the latter bodies are fully discussed by President Lowell, of Harvard University, in chapter ten of his book, Public Opinion and Popular Government, the sub-headings of which include "Pressure of Local and Private Interests" and "The Lobby" (pp. 133–135). Congressman Luce devotes chapter fourteen of his book on Legislative Assemblies to the same sad subject. At page 309 the learned author includes a passage from Confucius which is so apt that we are repeating it:

"How can a man serve the prince? When out of office, his sole object is to attain it; and when he has attained it, his only anxiety is to keep it. In his unprincipled dread of losing his place he will readily go all lengths."

43 Manifestly, none of these influences affect the delegate to a constitutional convention and he can be disturbed by no hope of political gain or fear of political punishment. If, on the other hand, we adopt the conduit pipe or mandat imperatif theory of representation (a view which seems to be rather more prevalent in this country), the object of the mandate must be presented to the voters before and not after their selection of delegates whom they intend to instruct. This is impossible, naturally, in the case of legislators elected prior to the submission of the particular amendment.

We are submitting the testimony of two experts in government each one from separate periods of our history. As the considerations we have just outlined are naturally commingled, we have not attempted to divide them.

"Though this mode, under proper restrictions and in cases to which it is adapted, may be followed without danger, yet it is subject to obvious objections. The legislature is a body chosen for temporary purposes. It is a mirror of political passions and interests, and, with the best intentions, can not be expected to be free from bias, even in questions of the highest moment. It is composed, moreover, in general, of politicians rather than of statesmen. Indeed, if a man shows himself, by culture and the breadth of his views, to be fitted for the highest trusts, it is nearly certain that he will not be found in the legislature, but be left in obscurity at home. But, when a convention is called, it is sometimes possible to secure the return of such men. It is not necessarily because such a body is recognized to be, as it is, the most important ever assembled in a State, but because the measures it is expected to mature bear less directly on the interests of parties or of individuals. Party management, therefore, is not usually so much directed to the seeking of

control of a convention as of a legislature. Besides, the proper function of the latter body, that of municipal legislation, being one of the highest vested by the sovereign in any governmental agency, it can not but be inexpedient, on a general view, that there should be added to it that of organic legislation, requiring different and higher gifts, and wider experience and study, thus threatening to unsettle the balance of the Constitution." Jameson, The Constitutional Convention, pp. 194–195 (1867).

44 "Another and perhaps more vital objection to the existing amendment process is that ratification can be effected by a relatively small number of persons who happen to be in the State legislatures at the time a proposition is submitted. In all there are about seventy-five hundred members in the forty-eight bodies combined. If we group the thirty-six States with the smallest assemblies together we find that approximately two thousand members properly divided between the upper and lower houses can carry or defeat a resolution of amendment laid before them by Congress.

"The number of persons taking part in the ratifying operation is not as significant as the fact that they are only incidentally concerned in it as legislators. They are elected for other purposes. Their main duty is to make laws for the States. Often they are chosen previous to the passage of a proposed amendment by Congress, and are thus asked to decide a matter which was not even before the public when they were candidates. Moreover the type of man found in the legislature is usually not as high as that generally elected to State constitutional conventions. Many people of great ability are willing to serve in a convention for a short period, who would not think of spending any time in the business of ordinary legislation. It is, therefore, not merely the political arithmetic of the amending system which invites criticism. It is to be criticized because it is casual in its nature and does not provide for that special and searching consideration which a change in the supreme law of the land deserves." Beard, The American Leviathan: The Republic in the Machine Age, p. 43 (1930).

Because of these factors of mechanical efficiency pertaining to a convention system of deliberation, political science also takes cognizance of what might be called, in these Freudian days, a psychological element. It is scarcely necessary to argue in favor of the duty and the expediency of watching closely the currents of public opinion before undertaking changes in government. Lecky: Democracy and Liberty, Vol. 2, p. 99. Public opinion, in its relation to law, is thus described in Lieber's Manual of Political Ethics:

"Public opinion is not only an opinion pronounced upon some subject, but it is likewise that which daily and hourly interprets laws, carries them along or stops their operation, which makes it possible to have any written laws, and without which the wisest law might be made to mean nonsense. It is that which makes it possible to prescribe and observe forms without their becoming a daily hindrance

of the most necessary procedures and actions; it is that mighty power which abrogates the most positive laws and gives vast extent to the apparently narrow limits of others; according to which a monarch ever so absolute in theory can not do a thousand things; which renders innocent what was most obnoxious, and at times makes useless the best intentioned measures, protecting sometimes even crime." 2d Ed., I, p. 223.

A convention, either because of directly instructed or abler delegates, is, as we have seen, a better vehicle for the expression of public opinion than a State legislature. Its ultimate acts will because of this fact command greater popular support and will not be faced to such an extent with the problem summed up in Professor McBain's chapter heading, "The Divine Right of Fifty-One Per-cent." Prohibition: Legal and Illegal (above cited). Counsel, in their reasoning based on the reservation to the people in the 10th amendment, were confusing the people as represented by a convention or a State legislature with public opinion as reflected in the two agencies.

The views of political science above expressed seem to have influenced the law givers of certain of these States. Thus, we find in the constitution of Missouri of 1875, article 2, section 3, providing as follows:

"The legislature is not authorized to adopt nor will the people of this State ever assent to any amendment or change of the Constitution of the United States which may in any wise impair the right of local self-government belonging to the people of this State";

and in the constitutions of Florida (1885) (art. 16, sec. 19) and Tennessee (1870) (art. 2, sec. 32) provisions to the effect that

"no convention or legislature of the State shall act upon any amendment to the Constitution of the United States, unless such convention or legislature shall have been elected after the amendment is submitted."

See also the article above cited in the Virginia Law Review with respect to a proposed addition to the constitution of Virginia of similar tenor. 14 Va. Law Rev. p. 191. Finally, Senator Wadsworth and Representative Garrett introduced a proviso to article 5 of the Constitution, which reads as follows:

"Provided, That the members of at least one house in each of the legislatures which may ratify shall be elected after such amendments have been proposed; that any State may require that ratification by its legislature be subject to confirmation by popular vote; and that until three-fourths of the States have ratified or more than one-fourth of the States have rejected or defeated a proposed amendment, any State may change its vote." S. J. Res. 40, 67th Cong., 4th Sess.

In commenting on this proposed amendment, Professor Miller, of the University of Minnesota Law School, says, and incidentally sup-

ports our view of the effect which should be given to the decision of the United States Supreme Court in Leser v. Garnett above cited:

"A persuasive argument can be made in favor of each of the three limitations. If each State were required to elect at least one house of its legislature before it could ratify, then the issue of ratification or rejection could be presented to the people of the State and a vote of instruction given to the Representatives elected. Stated in more practical terms, each legislative candidate could be forced to declare himself to be for or against ratification and his declaration could be made the basis of his own election or defeat. As a matter of fact, it has been urged by counsel before the United States Supreme Court that this limitation already exists in some of the States by virtue of laws existing thereon. The Supreme Court, however, rejected the contention in its opinion in the case of Leser v. Garnett and denied the power of a State to determine the method of ratification of an amendment of the Federal Constitution." 60 American Law. Rev., p. 183.

We are quite willing to stand flat footedly on our thesis that the scientific approach to this problem of government requires an approval and ratification of certain amendments by and in a convention, and that the language of article 5 can be taken as modified by the principles of political science before stated. For the doubting, however, we are prepared to call to our assistance two more purely legalistic doctrines. One of them was evolved by Judge Jameson with respect to the proposal of amendments. (It applies, a fortiori, and with even greater force to their ratification.) We state it as repeated and amplified by Professor Dodd:

47 "Judge Jameson has said as to the legislative method of proposing amendments: 'It ought to be confined, it is believed, to changes which are few, simple, independent, and of comparatively small importance. For a general revision of a constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has not been informed by prior discussion, the employment of this mode is impracticable, or of doubtful expediency.' With reference to this latter point, it may be argued, however, that if a constitution specifically provides two methods of alteration, the language employed with reference to the proposal of amendments by the legislative method may, when read with that concerning the convention method, often be construed as an implied prohibition of complete constitutional revision by the legislative method. Leaving aside the constitutional question, it would seem clearly preferable that when possible complete revisions or even alterations of a very thorough character should be made by conventions expressly chosen for that purpose. Legislatures will usually have their time taken up with other matters and be unable to devote sufficient time to this subject, and the election of a body for the one purpose concentrates public attention upon questions of a

constitutional character. The convention will ordinarily be able to do better work than the legislature because its attention will be confined to the one task of framing a constitution. Moreover, it has as a rule been possible to obtain for membership in conventions a higher grade of men than may usually be found in the ordinary legislative bodies, and this constitutes a practical reason of very great importance for not weakening the functions of conventions." Dodd, The Revision and Amendment of State Constitutions, pp. 261, 262.

The second follows from the nature of the congressional act of proposal. Only one writer that we have found has attempted any distinction between the functions of Congress in fixing the content of an amendment and in proposing the same for approval. Burgess, Political Science and Constitutional Law, p. 148.

In the case of Hollingsworth v. Virginia, above cited, counsel for the State of Virginia contended that the 11th Amendment had not been properly adopted, because it had never been submitted to the President for his approval, as required by article 1, section 7, of the Constitution. The United States Supreme Court, in a six line opinion, declared the amendment adopted, and thereby decided that the action of Congress in formulating and proposing amendments to the Constitution was not legislative. Whatever one may think of the logic of this decision with respect to the content of an amendment, the Supreme Court's estimation of the nature of the single act of submission to one or another body must be correct. At any rate, since Congress is not acting in a legislative capacity, it follows, we think, that the nature of its function is administrative. That being so, it falls within the ordinary principles which govern the judicial review of administrative action. A writer of an article under that title in 35 Harvard Law Review says:

"Somewhere in the discretionary power given to an administrative official there must be a standard to govern his action. If the standard is not expressly stated in the statute under which the official acts, it must be determined from its purpose—that is, the general object it is seeking to accomplish and the circumstance which called it forth." Pp. 127, 135.

The purpose of the amending clause, as we have tried to develop it in this opinion, would be violated by the submission of amendments tranferring powers from the States to the United States, and such submission would therefore constitute an abuse of discretion on the part of Congress in its capacity as an administrative agent.

Only the ratification of the 18th amendment is before the court for adjudication. Any comment on the method employed in the adoption of the other 18 would be another example of that habit of passing upon matters not before the court in which the judiciary so often indulges. In one aspect these amendments may, however, be pertinent, e. g., from the point of view of practical or contemporary

construction. At the commencement of this opinion we expressed some doubt as to the value of the doctrine of stare decisis. We have somewhat the same feeling with respect to the kindred principle above mentioned. We think the latter also amounts to saying, "What is good is old." We do not think that the legislative ratification of the other amendments of the Constitution need trouble even those who do not agree with us on this point.

The 12th and 17th amendments affected the machinery of government by varying the method of election of the President and of the United States Senators. The 11th and 16th amendments made certain changes in the judicial and taxing powers of the Federal Government, and in so doing corrected previous decisions of the United States Supreme Court. The 9th and 10th amendments were concerned, as we have seen, with the reservation of rights and powers. The first eight amendments and the 14th, 15th, and 19th amendments contained limitations upon the power of the United States or of the States. The 13th amendment in our opinion, presents certain points of resemblance to the 18th. We believe it is distinguishable, however, because it strikes down in terms the enslavement of human beings and operates directly upon the property laws of any States permitting that institution. It does not, as does the 18th amendment, contain a grant of power to regulate and prohibit certain acts. If we are wrong in this view, an examination of the Constitution and laws of the forty-eight States shows, as might be expected, that the question is in this day and generation an academic one.

Our people reluctantly delegated to the United States certain powers of government, whose exercise they had jealously guarded and previously permitted to the States alone. They also provided for two forms of approving any changes in the frame of government they had set up. The compulsory use of the heretofore untried method of approving or ratifying in conventions the transfer of additional powers from the States to the United States is consistent with both the history of our institutions and the principles of political science. Only a more perfect realization of this fact will permit our country to be "truthfully organized," as that expressive phrase is used in Professor Burgess' preamble to his book on Political Science and Constitutional Law. He says:

"A complete constitution may be said to consist of three fundamental parts. The first is the organization of the State for the accomplishment of future changes in the constitution. This is usually called the amending clause, and the power which it describes and regulates is called the amending power. This is the most important part of a constitution. Upon its existence and truthfulness—i. e., its correspondence with real and natural conditions—depends the question as to whether the State shall develop with peaceable continuity or shall suffer alternations of stagnation,

retrogression, and revolution. A constitution, which may be imperfect and erroneous in its other parts, can be easily supplemented and corrected, if only the State be truthfully organized in the constitution; but if this be not accomplished, error will accumulate until nothing short of revolution can save the life of the State." P 138, vol 1.

It will be observed that in the course of this opinion there has been no mention of the specific subject matter of the 18th amendment, such specific subject matter not being germane to the broad principles both counsel and the court have endeavored to lay down. In pondering the questions involved, we have wondered why the 18th amendment has not been tested in relation to the "due process clause" of the 5th amendment. We should think that such a test might be based on the following reasoning: The 18th amendment does not and could not, unless it expressly so declared, abrogate the due process clause of the 5th amendment. Any action thereunder must be regarded in the light of what is reasonable. Baltimore R. R. Co. v. Inter-state Commerce Commission (1911), 221 U. S. 612. The more advanced school of constitutional thinkers consider this "reasonableness" from the point of view of the efficacy of the remedy prescribed for any particular evil. Frankfurter, Realism in Constitutional Law.

Thus, in two cases in the United States Supreme Court vaccination and sterilization have been found to be efficacious in preventing the spread of smallpox and idiocy, and have therefore been sustained against attack under the due process clause of the 14th amendment (applicable to the States). Jacobson v. Massachusetts (1905), 197 U. S. 11; Buck v. Bell (1927), 274 U. S. 217.

Equally, we think, the efficacy of the 18th amendment and its enforcing legislation in preventing the spread of intemperance should be the criterion in deciding upon its validity under the due process clause of the 5th amendment applicable to the United States. We see no difference between improving the health and or morals
51 of people by the application of serum or the knife and improving their health and or morals by closing their mouths to drink. To determine this efficacy we willingly admit is a task in comparison to which the activities of Hercules in the Aegean stables are child's play. We do not believe it can be done, except by the method of testimony offered in open court, with cross-examination, stenographic records, and the other safeguards of judicial procedure. It manifestly can not be done on the hustings or in the market place in the atmosphere of personal abuse therein engendered. We do not consider, either, that it can be done in the halls of legislative bodies or in the chambers of executive commissions, both of which proceedings are subject to political criticism

and whose witnesses are bound to be the result of a more or less arbitrary selection.

We hope, therefore, that this question will be presented to some court some day. When it is, we humbly suggest that all concerned prepare themselves for the investigation by carefully reading chapter 7 of volume 2 of Lecky's great book, Democracy and Liberty (1896). They will find therein an unexcelled philosophical and practical discussion of the difficulties inherent in the attempt to legislate on intoxicating drink, as exemplified in the history of all the countries that have made such attempts. Mr. Lecky commences his discussion at page 111 in the following words:

"The most difficult of this class of questions, and among the most difficult in the whole range of practical politics, are those connected with the sale of intoxicating drink. They affect in the highest degree the pleasures, the comforts, the liberty, the morals, and the fortunes of the poor, and they affect, in very different ways, vast material as well as moral interests. Immense sums are invested in public houses. An immense revenue derived from the sale of intoxicating liquors pours into the coffers of the State; while, on the other hand, the mass of improvidence and ruin, or disorder and crime, of depreciation of property, and of police and prison expenditure, which is clearly traceable to excessive drinking, is so great that many persons would shrink from scarcely any measure, however drastic, to prevent it."

Those interested in bringing their information up to date would do well to read a book originally published by that well-known
52 social worker, Mrs. Rita Childs Dorr, entitled Drink, Coercion or Control?

We hold the adoption of the 18th amendment to be invalid, and the motion to quash the indictment is accordingly granted.

[Clerk's certificate to foregoing paper omitted in printing.]

53 In United States District Court

[Title omitted.]

Order quashing indictment

Entered and filed December 18, 1930

It appearing to the court, for the reasons stated in its opinion filed on the 16th day of December, 1930, that the eighteenth amendment to the Constitution of the United States is invalid and that the national prohibition act, enacted pursuant thereto, is therefore unconstitutional and void:

It is therefore ordered, adjudged, and decreed that the motion to quash the indictment heretofore filed be, and the same is, hereby

granted and that [illegible] and the same be [illegible] granted.

William Grubb, Judge.

(Clerk's certificate to foregoing paper omitted in printing.)
(File endorsement omitted.)

In United States District Court

[Title omitted]

Assignment of errors

Filed Dec. 18, 1930

And now on this [illegible] day of December, in the year one thousand nine hundred and thirty, comes the United States of America and

In Supreme Court of the United States

Statement of points upon which the appellant will rely and designation of parts of record to be printed

Filed Dec. 23, 1930

Statement

I

Pursuant to Rule 10 of this court, appellant specifies the following as the point upon which it intends to rely in the above entitled case: The eighteenth amendment to the Constitution of the United States having been proposed by a vote of two-thirds of both Houses of Congress, and having been submitted by Congress to the legislatures of the States for ratification, became valid to all intents and purposes as a part of the Constitution of the United States upon its ratification by the legislatures of three-fourths of the States, and consequently

the national prohibition act and other laws enacted under the power granted Congress by the eighteenth amendment are valid.

The entire record as filed should be printed.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
JOHN J. BYRNE, *Attorney.*

DECEMBER, 1930.

[File indorsement omitted.]

[Indorsement on cover:] File No. 35528. New Jersey D. C. U. S. Term No. 606. The United States of America, appellant, vs. William H. Sprague and William J. Howey. Filed December 20, 1930. File No. 35528.

FILE COPY

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No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION TO ADVANCE

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 606

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MOTION TO ADVANCE

Now comes the Solicitor General and moves the Court to advance the above-entitled cause for hearing at an early day convenient to the Court.

The case has been brought to this Court under the Criminal Appeals Act. The Court's jurisdiction clearly appears from the statement filed December 20, 1930.

The question involved is whether the Eighteenth Amendment was ratified in the manner required by the Constitution. That question was answered in the negative by the District Court, which granted a motion to quash an indictment charging violations of the National Prohibition Act on the

ground, assigned by the court, that that Act is invalid because the Eighteenth Amendment, pursuant to which it was enacted, was ratified by the legislatures of the States, as proposed by Congress, and not by conventions called for that purpose in the States.

The decision has received wide publicity and has produced uncertainty regarding the validity of the prohibition laws which, unless promptly settled by this Court, is likely to encourage disregard for those laws and will hamper the Government in their enforcement. The case was fully briefed and a lengthy opinion was rendered in the court below. The Government is ready to argue the case at the earliest convenience of the Court. Wherefore, this motion is presented.

On December 20, 1930, a letter was mailed to opposing counsel advising that this motion would be made on January 5, 1931, and counsel was formally notified of this motion and furnished with copies of the Government's brief in this Court, by mail, on December 30, 1930.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CLERK

No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1930

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT OF JURISDICTION

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis for this Court's jurisdiction in the above-entitled cause:

A

STATUTES

The statutory jurisdiction of this Court to review by direct appeal the judgment here complained of is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), otherwise known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

B

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment of the District Court was entered December 18, 1930. (R. 53.)[1] The application for appeal was made and the appeal was allowed the same day. (R. 54.) The case was docketed in this Court on December 20, 1930.

C

NATURE OF THE CASE

The indictment charged that the defendants had unlawfully transported certain quantities of intoxicating liquors containing one-half of one per cent or more of alcohol by volume and being fit for use for beverage purposes and with unlawfully possessing the same in violation of the National Prohibition Act. (R. 2–3.) A motion to quash the indictment was sustained on the ground that the National Prohibition Act is void because the Eighteenth Amendment to the Constitution, pursuant to which it was enacted, is void for the reason, assigned by the court, that that amendment was ratified by legislatures of the States, whereas under the Constitution it could be ratified only by conventions called for that purpose in the States.

[1] All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

D

CASES SUSTAINING JURISDICTION

United States v. *Stevenson*, 215 U. S. 190, 195–196.

United States v. *Patton*, 226 U. S. 525.

United States v. *Birdsall*, 233 U. S. 223.

United States v. *Yuginovich*, 256 U. S. 450, 461.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

JOHN J. BYRNE, *Attorney.*

DECEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CLERK

No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provisions involved	2
Statement	3
Specification of errors to be urged	3
Summary of argument	3
Argument	4
Conclusion	18
Appendix (extracts from briefs in the national prohibition cases)	19–22

CITATIONS

Cases:

Dillon v. *Gloss*, 256 U. S. 368 — 12–13

Hawke v. *Smith*, *No. 1*, 253 U. S. 221 — 4, 11–12

Hawke v. *Smith*, *No. 2*, 253 U. S. 231 — 12

Lake County v. *Rollins*, 130 U. S. 662 — 10

National Prohibition Cases, 253 U. S. 350 — 4, 13, 14, 15

New Jersey v. *Palmer*, No. 30, Original, October Term, 1919 — 13–14

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601 — 9–10

Rhode Island v. *Palmer*, No. 29, Original, October Term, 1919 — 14

Constitution:

Article V — 2, 4–5

Amendment X — 3

Miscellaneous:

1 Annals of Congress, 761, 768 — 6

The Federalist, No. 85 — 16

Journals of Continental Congress, IX, pp. 907,932 — 15

S. E. Morrison, Massachusetts Constitution of 1780, Proceedings of Massachusetts Historical Society for 1917, p. 400 — 16

Nevins, The American States During and After the Revolution, pp. 128, 129, 183 — 15

Pulliam, The Constitutional Conventions of Virginia, p. 13 — 15

Thorpe, Constitutions & Charters, VI, 3241, 3248, 3737, 3749; VII, 3812 — 15

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 606

THE UNITED STATES OF AMERICA, APPELLANT

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WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 6) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered December 18, 1930 (R. 37–38), and the appeal to this Court was petitioned for and allowed the same day (R. 38). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial

Code, as amended by the Act of February 13, 1925. (See Jurisdictional Statement of Appellant, filed December 20, 1930.)

QUESTION PRESENTED

The single question presented is whether the Eighteenth Amendment, which was proposed by Congress for ratification by the legislatures of the States and was ratified by three-fourths thereof, is void because not ratified by conventions called for that purpose in the States.

CONSTITUTIONAL PROVISIONS INVOLVED

Article V of the Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article X of the Amendments to the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT

The appellees were indicted in the District Court of the United States for the District of New Jersey for transporting and possessing fifty half barrels of beer in violation of the National Prohibition Act. (R. 2.) A motion to quash the indictment on the ground that the Eighteenth Amendment, pursuant to which the National Prohibition Act was enacted, is void because not ratified by conventions called for that purpose in the States (R. 3–5), was sustained, and the indictment quashed (R. 37).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In quashing the indictment.

(2) In holding that the Eighteenth Amendment to the Constitution was invalid, and that the National Prohibition Act, enacted pursuant thereto, is, therefore, unconstitutional and void.

SUMMARY OF ARGUMENT

Article V of the Constitution provides that Amendments shall be valid when ratified by the legislatures of three-fourths of the States, or by Conventions in three-fourths of the States, "as the

one or the other Mode of Ratification may be proposed by the Congress." It was held by the court below that the generality of this language should be modified by "principles of political science" and that an Amendment such as the Eighteenth Amendment could be constitutionally ratified only by conventions in the States.

We submit that the language of Article V is clear and entirely free from ambiguity, and that there is no room for the construction adopted by the court below. This Court has said: "The language of the article is plain, and admits of no doubt in its interpretation." *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 226. Furthermore substantially the present argument was presented to this Court in the *National Prohibition Cases,* 253 U. S. 350, where this Court determined that the Eighteenth Amendment, "by lawful proposal and ratification, has become a part of the Constitution."

ARGUMENT

Article V of the Constitution defines the ways in which that instrument may be amended by declaring that amendments may be proposed by two-thirds of each House of Congress, or by a convention called by Congress upon application of two-thirds of the legislatures of the States, and that the proposed amendments—

> in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conven-

> tions in three fourths thereof, *as the one or the other Mode of Ratification may be proposed by the Congress;* * * *. (Italics ours.)

Although this provision, in language which is susceptible of no ambiguity, vests in Congress the right to determine whether proposed amendments to the Constitution shall be submitted for ratification by the State legislatures or by ratifying conventions in the States, counsel for the defendants contended in the court below that the Eighteenth Amendment could constitutionally be ratified only by the second, or convention, method. In support of that argument two grounds were urged:

(1) That it was the intention of the framers of the Constitution, and therefore must be regarded as impliedly required by that instrument, that all proposed amendments to the Constitution which would confer upon the national government additional direct powers over the people or their rights should be ratified by the people in constitutional conventions; that the Eighteenth Amendment is of that character because it confers upon Congress the power of direct regulation and control over the right of the people to possess and use intoxicating liquors, and that in proposing the Eighteenth Amendment for ratification the power vested in Congress by Article V was accordingly limited so as to require the submission of that amendment for ratification by conventions in the States.

(2) That if not thus impliedly qualified by the original Constitution, the power conferred upon Congress by Article V was so qualified by the Tenth Amendment, which reserves "to the States respectively, or the people" the powers not delegated by the Constitution to the United States nor prohibited by it to the States.

In elaboration of the second point, counsel in their brief filed in the court below (pp. 71–77) referred to proceedings in the House of Representatives when the Tenth Amendment was under consideration by that body. As it emerged from the Committee of the Whole that amendment read:

> The powers not delegated by the Constitution nor prohibited by it to the States, are reserved to the States respectively.

Upon motion of Daniel Carroll of Maryland the words "or to the people" were added at the end of the foregoing clause. 1 Annals of Congress 761. Thereafter, upon motion of Roger Sherman, the words "to the United States" were inserted immediately after the word "delegated," so that the clause read as it now appears in the Constitution. 1 Annals of Congress 768. Although these changes were adopted without debate, counsel argued that they were made with Article V in mind and were designed to require that proposed amendments which would confer upon the national government additional direct powers over the people or their rights should be submitted for ratification by the people, that is, by conventions in the States.

The court below discarded counsel's argument based on the Tenth Amendment. It declared that if, as counsel contended, that Amendment reserved "to the people" the power to make such changes in the Constitution as directly affected the people or their rights, that reservation would not be met by the submission of such amendments for ratification by State conventions, rather than by State legislatures, because neither the one nor the other of these ratifying bodies would be "the people." It further held that as the "power to regulate the conduct of individuals for what is assumed to be the benefit of the general mass," commonly known as the "police power," is inherent in the State, as distinguished from the people, the Tenth Amendment could not have been intended to require ratification by the people, as distinguished from the States, of amendments to the Constitution such as that effected by the Eighteenth Amendment.

Observing, however, that it gave full weight to the development by counsel of the tacit assumptions to be drawn from the historical and theoretical nature of the Federal system, although its own development of those assumptions did not parallel that of the briefs, the court entered into an extensive discussion of the writings and speeches, both in and out of the Convention, of those who took part in the adoption of the Constitution, as well as of the theory and practice existing at that time respecting the establishment and maintenance of constitutional governments, including those of the

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several States, and of the views expounded by writers on popular and representative government, all of which the court assumed was familiar to the framers of the Constitution. Concluding this branch of its opinion, the court said (R. 27):

> It seems indisputable that local self-government, popular sovereignty, and the convention system of drafting and amending constitutions were the very "warp and woof" of the political thought of the whole period prior to the drafting and adoption of the Federal Constitution.

Passing from what it termed the "stereotyped method of constitutional interpretation," and remarking (R. 28) that "We prefer to regard our frame of government as a problem in political science, to be solved as far as may be, according to scientific principles," the court cited and quoted from many publications on political science and other allied subjects as showing that the convention method for ratifying constitutional amendments was required by the principles of that science. Summarizing its conclusions on that subject, it said (R. 29):

> Political science can give only one answer to the question presented by the alternative methods of ratification prescribed by article 5. If the amendment to be considered is one designed to transfer to the United States powers heretofore reserved to the States, or,

> if there are any such, to the people, that answer must be in favor of the convention method."

And again (R. 33):

> We are quite willing to stand flat-footedly on our thesis that the scientific approach to this problem of government requires an approval and ratification of certain amendments by and in a convention, and that the language of article 5 can be taken as modified by the principles of political science before stated.

Whether or not the "tacit assumptions" found by the court to exist in the Constitution because of its political background and because required by the principles of political science would have the effect of restricting the submission of the Eighteenth Amendment to State conventions for ratification if Article V of the Constitution were less clear in its grant of power to Congress to determine which of the alternative modes of ratification therein prescribed should be adopted, we respectfully submit that in the face of the unequivocal language by which that grant is conferred the grounds upon which the court based its decision are plainly untenable.

As stated by this Court in *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 618–619:

> The words of the Constitution are to be taken in their obvious sense, and to have a reasonable construction. In *Gibbons* v. *Ogden*, Mr. Chief Justice Marshall, with his

> usual felicity, said: "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said."

Similar views were expressed in *Lake County* v. *Rollins*, 130 U. S. 662, 670. While that case involved a construction of the constitution of a State, the Court announced a rule of construction which is fully as applicable here:

> We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

Moreover, this Court has determined the effect of the ratifying clause of Article V in the following cases:

In *Hawke* v. *Smith, No. 1*, 253 U. S. 221, wherein the ratification of the Eighteenth Amendment was involved, the question presented for decision was whether a provision of the Ohio constitution, extending the referendum to the action of the General Assembly in ratifying proposed amendments to the Federal Constitution, was in conflict with Article V of the Constitution of the United States. Answering this question in the affirmative this Court said (p. 226):

> This article [the Fifth] makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be proposed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. *The method of ratification is left to the choice of Congress.* Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.
>
> The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically

> granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. *Dodge* v. *Woolsey*, 18 How. 331, 348. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. *The language of the article is plain, and admits of no doubt in its interpretation.* It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed. (Italics ours.)

Hawke v. *Smith, No. 2*, 253 U. S. 231, which was decided upon the authority of the preceding case, differed therefrom only in that it involved the Nineteenth Amendment to the Constitution, extending the right of suffrage to women.

In *Dillon* v. *Gloss*, 256 U. S. 368, it was argued that the Eighteenth Amendment was invalid because of the requirement that it be ratified by the State legislatures within seven years of the date of submission. This Court overruled the contention. After referring in its opinion to the methods provided by Article V for proposing amendments to the Constitution, the Court said (p. 374):

> When proposed in either mode amendments to be effective must be ratified by the legislatures, or by conventions, in three-fourths of the States, "as the one or the other mode

> of ratification may be proposed by the Congress." Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending that instrument that the amendment be submitted to representative assemblies in the several States and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three-fourths of the States shall be taken as a decisive expression of the people's will and be binding on all.

It is true that the precise question now raised, namely, whether the Eighteenth Amendment is void because not ratified by conventions in the States, was not involved in the foregoing cases. But the question was presented to the Court in the *National Prohibition Cases*, 253 U. S. 350. Thus in the "Brief of Complainant on Motion to Dismiss" (p. 16), submitted on behalf of the State of New Jersey by its Attorney General, in *New Jersey* v. *Palmer*, No. 30, Original, October Term, 1919, it was urged:

> If any part of this reserved power may be delegated by amendment of the Constitution, to the national government, it must have been the intent of the people if there was any such intent at all, that such alteration should only be made by the calling, through Con-

> gress, of conventions for ratification in three-fourths of the several states. The alternative method for ratification, incorporated in the Article, must be used in such a case if such legislative matter can possibly be incorporated in the Constitution at all.

Numerous other briefs were filed in the *National Prohibition Cases*, several of which advanced arguments quite similar to the position taken by the court below. See, for example, "Brief of Complainant on Motion to Dismiss," in *Rhode Island* v. *Palmer*, No. 29, Original, October Term, 1919, at p. 120; "Brief of Amici Curiae," filed in the same case by Elihu Root and others, at pp. 12–13; and Brief of Alexander Lincoln and Michael J. Lynch, as *amici curiae*, in the same case, at p. 8. See also Article IX (4) of the bill of complaint filed by the State of New Jersey in No. 30, Original, October Term, 1919. For convenience extracts from the briefs referred to above are set out in the Appendix, *infra* pp. 19–22.

The contention thus urged in various forms, that the Eighteenth Amendment is invalid because not ratified by the people through conventions called for that purpose in the States, was rejected by this Court. This Court said (253 U. S. at 385–386):

> The cases have been elaborately argued at the bar and in printed briefs; and the arguments have been attentively considered, with the result that we reach and announce the

following conclusions on the questions involved:

* * * * *

5. That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

While differing in form, the arguments made in the *National Prohibition Cases* and those made here all rest on the proposition that the character of the proposed amendment determines the mode of ratification, and are alike disposed of by the holding in those cases that the Eighteenth Amendment was lawfully proposed and ratified.

The Articles of Confederation proposed by the Continental Congress were submitted to and ratified by the legislatures and not by conventions in the States (Journals of Continental Congress IX, 907, 932), and these Articles could only be amended in the same manner (Article XIII). In several of the States, constitutions had been adopted by the legislatures without submission to the people. This was true in South Carolina, Vermont, and Virginia. Thorpe, Constitutions & Charters, VI, 3241, 3248, 3737, 3749; VII, 3812; Pulliam, The Constitutional Conventions of Virginia, 13; Nevins, The American States During and After the Revolution, 128. In Massachusetts and in New Hampshire, constitutions had been submitted to town meetings for ratification. Nevins, *supra*, 183;

S. E. Morrison, Massachusetts Constitution of 1780, Proceedings of Massachusetts Historical Society for 1917, p. 400. In no other State prior to 1789 had a constitution been submitted to popular vote. Nevins, *supra*, 128, 129. In five of the States the constitutions provided for amendment by conventions (Pennsylvania, Vermont, Georgia, Massachusetts, and New Hampshire); four had no provisions for amendment (New Jersey, New York, North Carolina, and Virginia), and three provided for amendment by legislative action (Delaware, Maryland, and South Carolina).

The debates in the Federal Constitutional Convention show that the methods for ratification and for amendment of the Constitution were carefully distinguished. Ratification as provided in Article VII was to be by State conventions, but it was left for Congress to determine whether amendments proposed should be ratified by State legislatures or State conventions.

In No. 85 of "The Federalist," Hamilton said:

> Nor however difficult it may be supposed to unite two-thirds, or three-fourths of the State Legislatures, in amendments which may affect local interests, can there be any room to apprehend any such difficulty in a union on points which are merely relative to the general liberty or security of the people. We may safely rely on the disposition of the State Legislatures to erect barriers against the encroachments of the National authority.

In the first session of the First Congress, during the discussion on the proposed amendments to the Constitution, Gerry who had been a member of the Constitutional Convention, said (1 Annals of Congress, 716):

> The conventions of the States, respectively, have agreed for the people, that the State Legislatures shall be authorized to decide upon these amendments in the manner of a convention. If these acts of the State Legislatures are not good, because they are not specifically instructed by their constituents, neither were the acts calling the first and subsequent conventions.
>
> * * * * *
>
> The Legislatures are elected by the people. I know no difference between them and conventions, unless it be that the former will generally be composed of men of higher characters than may be expected in conventions; and in this case, the ratification by the Legislatures would have the preference.

An argument of great weight is found in the practical construction of Article V by Congress since the adoption of the Constitution. Nineteen Amendments to the Constitution have been adopted and at least five additional Amendments have been proposed by Congress. All of these Amendments and proposals were referred by Congress to the legislatures and not to conventions. Of the Amendments, certainly the Thirteenth, and apparently the Sixteenth and Nineteenth, operated to grant powers

to the Federal Government which had formerly been reserved to the States. The proposed Child Labor Amendment was of the same type. The Fourteenth Amendment imposed serious restraints upon the powers expressly reserved under the Tenth Amendment. Yet all of these Amendments were referred by Congress to the legislatures without any suggestion that the Constitution required that they be referred to conventions. We are not aware that the action of Congress in proposing the legislative mode of ratification has ever been challenged except in the case of the Eighteenth Amendment.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX

In the "Brief of Complainant on Motion to Dismiss," filed in *Rhode Island* v. *Palmer,* No. 29, Original, October Term, 1919, it was argued (p. 120):

> The Legislature of a State, in ratifying an amendment, does not act for the State, and can not relinquish the sovereign powers of the State. The Legislature is a creature and not the creator of a State constitution. The members of a State Legislature have official powers, but they do not participate in sovereignty in any other capacity than as citizens, like other citizens of the State. A State is bound in respect to its sovereign powers only by an explicit act of the whole people. If the sovereign powers of a State reside in the people of the State, so the discretion in the exercise of those powers resides in the people. Congress may not constitutionally propose, therefore, nor may the Legislature of a State constitutionally ratify any proposition as an amendment that involves the exercise or the relinquishment of the sovereign powers of a State. The people of a State alone are competent to an expression of sovereign will.

The "Brief of Amici Curiae," filed in the same case by Elihu Root and others, contains the following argument (pp. 12–13):

> Nor has the reference of proposed amendments to state legislatures under article V in its practical working proved to be an op-

portunity for the people of the United States or of the several States to express their will regarding the proposed eighteenth amendment. Not only have the people of the several States had no opportunity to act upon this proposed amendment, but they have been denied the opportunity, and the amendment has been ratified in entire disregard of the limitations which the people of a large number of the States have imposed upon their legislatures for the purpose of securing an opportunity to act themselves upon important subjects.

* * * * *

Those who assert the validity of these ratifications do not claim that at the time the so-called eighteenth amendment was proposed it was the will of the people of the United States to be represented in matters of constitutional change by the state legislatures. When legislatures acted upon the proposal, they did so, rightly or wrongly, not because the people of their State chose to speak through them, or were in fact represented by them, but solely in the alleged exercise of the agency or authority granted the state legislatures by article V of the Constitution more than a century ago. In some States the action of the state legislature was in express violation of the commands of the people of the State.

In the brief of Alexander Lincoln and Michael J. Lynch, as *amici curiae,* in the same case, it was contended (p. 8):

The eighteenth amendment has not been adopted as an original constitutional provision by the people of the United States. It was not proposed by any constitutional con-

vention, nor has it ever been submitted to the people of the several states, directly or in convention assembled, for ratification. Three sovereign states have declined to ratify the amendment, and the other states have acted solely through their legislatures, even although in a number of states their own constitutions require submission to the people by a referendum. Indeed, so hasty was the action that in many states the people had no chance to express themselves even by a choice of legislators. In the one state, Ohio, where a referendum has been had, the people voted against ratification. It is doubtful whether a majority of the people were ever in favor of the adoption of the amendment.

It is only through the original Constitution, if at all, by virtue of the authority given by Article V, that the will of the people in their constitution-making capacity has been expressed. Our contention is that the so-called eighteenth amendment is not such an amendment as is authorized by Article V, and that it was beyond the power of the amending agency, therein appointed, to propose and ratify such an amendment.

In *New Jersey* v. *Palmer*, No. 30, Original, October Term, 1919, the bill of complaint alleged in Article IX (4):

That the said joint resolution proposing an amendment to the Constitution of the United States was not ratified by the Legislatures of three-fourths of the respective States in the sense and meaning of the use of the term "Legislatures" in the Constitution of the United States as alleged in Article VIII of this bill; and that, in any event, whatever might be the power of the people of the United States acting through

conventions elected for that purpose or otherwise to include in the National Constitution ordinary acts of legislation unalterable by the people of the respective and several States contrary to any grant conferred or delegation of power given in the Constitution, and expressly reserved by the tenth Article of Amendment, * * * such as purports to be exercised by the prohibitions and alleged authority of said so-called Eighteenth Amendment, no such power has been exercised by the people of the United States in respect of such alleged Eighteenth Amendment, but the proposal was submitted, or attempted to be submitted, in the manner provided in Article V of the Constitution in the alleged exercise of a special power conferred by that article contrary to the true intent and meaning thereof, * * *.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 606

THE UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM H. SPRAGUE AND WILLIAM J. HOWEY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

MEMORANDUM FOR THE UNITED STATES

Since the decision of Judge Clark in the above-entitled case, the Circuit Court of Appeals for the Second Circuit has rendered an opinion in the case of *United States* v. *Louis E. Thibault*, upholding the validity of the Eighteenth Amendment. This opinion rendered January 5, 1931, has not yet been reported. For the convenience of the Court it is printed below.

In the United States Circuit Court of Appeals for the Second Circuit

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UNITED STATES OF AMERICA, APPELLEE
against
LOUIS E. THIBAULT, APPELLANT

Before MANTON, AUGUSTUS N. HAND, and CHASE, *Circuit Judges.*

Appeal from the District Court for the District of Vermont. The defendant was convicted of violation of the National Prohibition Act as amended by the Jones Law. (§12, title 27, U. S. Code.) Affirmed.

Harry B. Amey, Esq., U. S. attorney, attorney for appellee.

Evarts & Perkins, Esqs., attorneys for appellant.

Seldon Bacon, Esq., Daniel F. Cohalan, Esq., Jeremiah M. Evarts, Esq., of counsel.

MANTON, *Circuit Judge.*

The appellant was convicted by a jury of a violation of the National Prohibition Act as amended by the Jones Law. (§ 12, title 27, U. S. Code.) On this appeal, he seeks only to review the validity of the adoption of the Eighteenth Amendment to the Constitution, which provides:

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Article 5 of the Constitution provides the method of proposing and ratifying amendments to the Constitution. It reads:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no

> Amendment which may be made prior to the Year One thousand and eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State without its Consent, shall be deprived of its equal Suffrage in the Senate.

The Tenth Amendment of the Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

It is argued that after the ratification of the Tenth Amendment, no amendment giving the national government additional power over the people or their rights can be adopted save by the people in convention. The Eighteenth Amendment was ratified by the legislatures of three-fourths of the several states.

The fifth article of the Constitution contemplated, by its phrase, two modes of ratification: (1) by the legislatures of three-fourths of the several states, and (2) by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. But it is argued that Congress never selected the one appropriate to the nature of the amendment promulgated by it. And it is said that when the framers of the Constitution focused their work on future amendments of the document, they were confronted by its dual

function as a chart to guide the new supergovernment.

Some of the personal rights obtained from the British crown, as well as the governmental powers possessed by the colonies, or states as successors of the crown, had to be surrendered by them and bestowed upon the Federal government to enable it to function nationally and internationally. As early as *McCulloch* v. *Maryland* (4 Wheat. 316, 403), the Supreme Court pointed out that the Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States, and that the States surrendered to the general government powers specifically conferred upon the nation; that the Constitution and laws of the United States were supreme. The Supreme Court said in *Hawke* v. *Smith* (253 U. S. 221, 226):

> The framers of the Constitution realized that it might in the progress of time and the development of new conditions require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article.
>
> This article makes provision for the proposal of amendments either by two-thirds of both houses of Congress, or on application of the legislatures of two-thirds of the States; thus securing deliberation and consideration before any change can be pro-

posed. The proposed change can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States. The method of ratification is left to the choice of Congress. Both methods of ratification, by legislatures or conventions, call for action by deliberative assemblages representative of the people, which it was assumed would voice the will of the people.

The Fifth Article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods, by action of the legislatures of three-fourths of the States, or conventions in a like number of States. (*Dodge* v. *Woolsey*, 18 How. 331, 348.) The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

In the National Prohibition Cases (253 U. S. 350, 386), the Supreme Court squarely held that

the Eighteenth Amendment, prohibiting the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes was within the power to amend as reserved by the Fifth Article of the Constitution; that the amendment had been lawfully proposed and ratified and had become a part of the Constitution and must be respected and given effect the same as other provisions of that instrument. And in *Leser* v. *Garnett* (258 U. S. 130, 137), where the contention was raised that in several of the states ratifications by legislatures were illegal, the court said:

> But the function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a State.

But it was not within the amending power to deprive any state, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution or which the Constitution did not prohibit it from exercising after the Tenth Amendment. The power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution. There was a reservation to the several States of all the powers of gov-

ernment which they had not granted to the national government by the Constitution or which the Constitution had no prohibited them from exercising. Every State remained a self-governing political community in respect of its own inhabitants; in every relation where those inhabitants are not by the Constitution placed under the authority of the national government. What is retained by the states as "rights, privileges, and powers" constitutes the state sovereignty and the people of every state of the several states of the union have under their control entirely every relation of their inhabitants, that is not under the control of the United States by reason of some provision of the Federal Constitution. With these domestic relations, the State's inhabitants can deal as they see fit.

If it is proposed to delegate further powers to the national government, art. 5 intends the delegation, if amendment be made, of some federal function. But the Tenth Amendment does not alter the fifth article. The Fifth Article directs the manner in which proposed amendments shall be submitted to the States. The representatives of the people determine whether the amendment shall be adopted and this is entirely consonant with popular government. No authority is taken away from the people, for the people elect their representatives in the state legislatures as well as the members of their Constitutional conventions. The national government is not concerned in the control

or the method whereby the elections of members of the legislatures or members of the Constitutional convention may be conducted.

There has been a long acquiescence and approval of the method of proposing and ratifying amendments as followed in the case of the Eighteenth Amendment. The Constitution was adopted in 1789. The first ten amendments were adopted in 1791; the eleventh amendment on January 8, 1798; the twelfth amendment on September 25, 1804; the thirteenth amendment on December 18, 1865; the fourteenth on July 28, 1868; the fifteenth on March 30, 1870; the sixteenth on February 25, 1913; the seventeenth on May 31, 1913; and the nineteenth on August 26, 1920. All, even the first ten, were proposed and ratified in like manner to the eighteenth. Pursuant to art. 5, the alternative power rested in the people, to be exercised by a choice of members of the legislatures of the several states or the Constitutional conventions and by the choice of representatives in Congress.

In National Prohibition Cases, supra, Honorable Elihu Root raised in his brief before the Supreme Court the question whether an unrestricted power of amendment was vested "in Congress and three-fourths of the State legislatures" by Article V of the Constitution. His statement (reported at pages 364 and 365) in 253 U. S. was: "The people could by appropriate proceedings amend the Constitution so as to impair such vital rights as free-

dom of religion, but it is inconceivable that any such unlimited power has been delegated to the amending agents, who may represent but a minority of the people." He further said (p. 365): "If as contended by the defendants, the power of amendment vested in Congress and three-fourths of the State legislatures be absolute and unrestricted, then there would be no limitation whatever upon their legislative authority * * * We are not at liberty to assume that in and by Article V it was contemplated that they were vesting legislative power without limitation in the Congress and the legislatures of three-quarters of the States." This argument must have been held insufficient to invalidate the Eighteenth Amendment before the Supreme Court could conclude as it did in the National Prohibition Cases, at page 386, that the "amendment, by lawful proposal and ratification, has become a part of the Constitution."

After the foregoing decision it is impossible to maintain that because of any undelegated power to control amendments remaining in the people the method of adopting the Eighteenth Amendment was not within the powers delegated under Article V of the Constitution. The Tenth Amendment could have no application to Article V because the former only reserved "powers not delegated to the United States" and the power to choose the "method of ratification * * * (had been) left to the choice of Congress." (*Hawke* v. *Smith*, 253 U. S. at p. 226.)

Appellant says that the words "to the people" in the Tenth Amendment which provide that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" refer to the power to amend the Constitution and that the people had never delegated that power to the United States. But they had delegated to Congress the power to propose and to choose the mode of adoption of amendments. The Tenth Amendment contained a reservation "to the people" as well as "to the States" of powers not delegated because "the people" themselves were thought to have retained special powers in view of the fact that the governments of the States existed under written constitutions which limited from the beginning the exercise by the States of complete sovereignty. Powers which the States might not exercise as against their own citizens were properly called in the Tenth Amendment powers of the "people" as distinguished from those of the States and such powers of the "people" were reserved to them when not "delegated to the United States."

The Tenth Amendment embodied a rule of construction affecting the Constitution as it stood and all the preceding amendments, but it had no bearing on the power to choose the method of adoption of amendments already delegated to Congress by Article V. There is nothing anywhere to indicate that the "powers * * * reserved * * * to the people" could not thereafter be delegated to the

United States through amendments to the Constitution adopted in either way provided in Article V. Indeed, appellant's argument concedes that amendments through constitutional conventions would be sufficient and stops short of the contention that fundamental rights can not be abridged by any form of amendment. The words "reserved * * * to the people" can not be regarded as a limitation upon the choice of modes of amendment afforded by Article V.

If it is the will of the people to change by amendment the Constitution, the method provided in Article V was effective even after the passage of the Tenth Amendment. The Supreme Court cases referred to are authoritative and binding upon us. It follows that the defense interposed of unlawful ratification of the Eighteenth Amendment is without merit. The judgment of conviction is affirmed.

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No. 606.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

MEMORANDUM FOR RESPONDENTS ON MOTION TO ADVANCE THE CASE FOR HEARING.

THE BALLOU PRESS NEW YORK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA,
Appellant,

against

WILLIAM H. SPRAGUE and
WILLIAM J. HOWEY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

STATEMENT BY COUNSEL FOR APPELLEES ON MOTION TO ADVANCE BY THE UNITED STATES.

The undersigned makes no objection to an order advancing the above entitled cause for hearing, provided it be for a date not earlier than April 15th, 1931, and asks that no earlier date be set for the following reasons:

The case is of the greatest importance, involving, as it does, fundamental questions of constitutional law, much broader than the constitutionality of the Eighteenth Amendment.

Counsel for the respondents are serving voluntarily as members of the Bar, interested in the constitutional questions involved, representing no organization or group, but appearing solely as a matter of public duty and service.

A scholarly opinion has been rendered by the Court below, which materially aids and supplements the argument contained in our brief in that Court.

The Addenda referred to by the District Judge in his opinion have not, as yet, been filed, even in the District Court.

For the fullest presentation of the important issues involved, counsel desire ample opportunity to prepare their brief. Counsel, Mr. Bacon, Judge Cohalan, Mr. Cohen and the undersigned are at work upon the brief. They are busy practitioners, active in the Trial and Appellate Courts, and engaged in the performance of public and private duties. Mr. Cohen, for instance, is at present officially engaged in the preparation of a report to the Legislature of New York and in research work in connection with the rights of the State of New York in the St. Lawrence River, which must be completed in February.

While it is true that the Solicitor General has served a brief, which has received wide publicity in the Press, that brief contains no reference to the record, as required by the Rules, and fails, in our judgment, to state fully the questions involved and, indeed, takes it for granted that this court is foreclosed from considering the points raised by us and favorably passed upon by the court below.

The foremost question involved in this case is: Can additional powers over the people and their rights be granted to the United States by amendment to the Constitution, unless that amendment be adopted by the people in Conventions duly assembled for that purpose in their several States? We purpose to show, by historical references, by decisions of this court and other courts, and by considered argument that this question must be answered in the negative if the ultimate sovereignty of the people, the cardinal principle of our government, is to be maintained.

We purpose to distinguish all the cases affecting the Eighteenth Amendment and to show that in none of them were the questions, now raised by us, and determined by the court below, presented or considered. In fact, the court below has expressly decided, in opposition to the contention of the government, that these questions have never been passed upon by this court.

We further contend that the questions we raise could not arise concerning, and do not affect any other amendment to the Constitution.

We further respectfully state that this court is not foreclosed, by anything it has said or by anything counsel in any other case have said, from giving to the questions of law presented by this cause the full and adequate consideration which their importance demands. To this end, adequate opportunity for the preparation and presentation should be allowed to counsel.

No adequate reason has been advanced by the Solicitor General for undue haste, either in the preparation of briefs, or in argument or decision. No other court has, as yet, followed the ruling of the learned Judge below, even in the District of New Jersey.

It is true that wide publicity has been given to this decision, but the enforcement agencies of the government have not ceased to function. Public notice has been given by its law department that those who continue to violate the National Prohibition Act will be prosecuted, regardless of this decision. Committing magistrates are still holding alleged offenders to bail and Grand Juries still continue to indict. No evidence is forthcoming that in the last few ~~months~~ weeks the people, because of this decision, are having any less regard for the so-called "Prohibition laws" than they have had in the past, or that government officials are hampered by this decision.

The original Constitution was adopted by act of the people in their conventions held in their respective States and no amendment prior to the Eighteenth attempted to grant any powers of government over the people within their respective States to the United States.

This question we shall show was not argued or considered in *Hawke* vs. *Smith*, No. 1, 253 U. S. 221, or in *Dillon* vs. *Gloss*, 256 U. S. 368, nor was it argued, considered or passed upon by this court in the *National Prohibition Cases*, 253 U. S. 250, despite the contentions to the contrary now made by the Government in its brief.

Our interpretation of Article V of the Constitution and of the Tenth Amendment is based upon careful historical

study of the making of the Constitution, of representations made as to its meaning to secure its adoption by the people, of the careful phrasing and rephrasing of the Tenth Amendment, and of the decisions of this court.

The present motion, as we read the rules, is premature for the following reasons:

FIRST: The return day of the citation is January 17, 1931.

SECOND: No complete record on appeal has yet been prepared, filed or served.

THIRD: The time to answer the government's Statement of Jurisdiction has not expired, and the Statement contains a serious error, to which in due course answer will be made, pointing out that error, and there has been no waiver of the right to file the answer to that Statement in less time than that required by the Rules.

FOURTH: The statement in the motion papers of the questions to be considered is incomplete and inaccurate. The Government assumes that the only question to be presented to this court for determination is, whether or not the points raised in the court below have already been determined by this court in previous cases. With that assumption, we take direct issue. The only court which has passed upon that question, after hearing argument, has decided against the Government. And, of course, the case must rest for final determination upon the decision of the court below and not merely upon any part of its opinion.

Among the questions to be presented on this record, not yet considered or passed upon by this Court, are the following:

1. Did not the dominant aim and purpose of the Constitution, declared in the Preamble of the Constitution, and supported by the method of its adoption, its other provisions

and all the surrounding circumstances, require construction of the Fifth Article so as to restrict the power of selection of a method of adoption so as to require, in this instance, adoption by those competent to grant the added power, namely, the people assembled in conventions in their several States?

2. Did not the Tenth Amendment impose this construction on the Fifth Article?

3. If the original instrument did, by the V Article, grant any such powers to legislatures, does not the Tenth Amendment, with its express reference to "powers not delegated *to the United States* by this Constitution" and its reservation of powers "to the people", *qualify*, *supersede* and *revoke* any such grant of powers to legislatures and reserve "*to the people*" their sole original power to grant further powers to the government over themselves and their rights?

4. Did not the proposal of the Eighteenth Amendment by the Congress expressly "*to the States*", therein differing from the form of proposal of every other amendment, preclude the legislatures from acting thereon as representatives of the people to whom it was not proposed?

5. What was the power reserved to the people by the Tenth Amendment, unless the power to amend away their own rights and to confer on the Government added power over themselves and their rights?

If the reasonable time we ask for the preparation and presentation of these questions is accorded, we are willing to waive our objections to the premature character of the motion and to consent to the cause being advanced for hearing to a date not earlier than April 15th next. And at the same time, we ask that a full day be set aside for the consideration of the fundamental questions involved, and for leave for more than two counsel to be heard.

The error we wish to point out in the Statement of Jurisdiction does not go to the Jurisdiction of this Court, but to the fact that this amendment was not proposed by Congress in the usual form to the legislatures, or even generally, but was, in terms, proposed "*to the States*" for their adoption; the only instance of such a proposal; and this important error we think should not be allowed to pass unnoticed or unchallenged, even in the Statement of Jurisdiction.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for Defendants.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

No. 606.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

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THE BALLOU PRESS NEW YORK

INDEX.

PAGE

Table of Cases and Authorities iii

Corrections of Appellant's Statement 1

Questions Involved 3

Summary of Argument 6

Points 11

I. Power of selection in Article V not an arbitrary power, Congress had to conform to nature of proposed amendment 11

II. Meaning controlled by general purpose of instrument and intent of those who made it 13

III. Sovereignty resides in the People. The People alone could grant the power sought to be conferred by the XVIII Amendment 18

IV. Legislatures represented States—Conventions represented the People—Distrust of legislatures unwillingness to trust the People's rights to their care 26

V. Convention records show there was no intent to give legislatures power by Article V to adopt amendments granting new powers over the People 31

VI. Such construction is confirmed by the Preamble and the general purpose of the instrument and was urged in order to secure adoption of the Constitution 42

B.

THE TENTH AMENDMENT ELIMINATED THE POSSIBILITY OF ANY SUCH POWER IN LEGISLATURES 52

VII. Importance of the historical fact that there was no actual intention to grant them such power 52

PAGE

VIII. Struggle over adoption of Constitution was over question of prior amendments safeguarding the people in their rights. Such amendments promised in order to secure adoption.

Importance of restricting power to amend expressly stated.

First ten Amendments adopted expressly to safeguard the people's rights and powers from encroachment 55

IX. Phraseology of X Amendment altered to make it apply to and limit the power delegated to legislatures to adopt amendments 63

X. Amendment X did so limit the power of legislatures 76

XI. Article V did not make legislatures representatives of people to adopt amendments, but provided an alternative method of adoption by legislatures, *without going to the people* 81

XII. Amendment XVIII was expressly proposed "to the States" 83

XIII. No other amendment attempts to grant powers over the people 87

XIV. Questions now presented not heretofore decided 93

XV. Consideration of the Opinion of the Court below 101

XVI. Importance of questions presented 104

Conclusion 104

Appendix A. Constitutional Amendments XIII, XVI and XIX 107

Appendix B. Extracts from Elliot's Debates 108

Appendix C. Extracts from Farrand and from the Federalist 133

Table of Cases and Authorities.

PAGE

Barron v. Baltimore, 7 Pet. 243.....18, 55, 56, 57, 72, 73
Carroll v. Lessee of Carroll, 6 Wheat. 264..... 99
Chisolm v. Georgia, 2 Dall. 419.....98, 106
Cohens v. Virginia, 6 Wheat. 264.....72, 99, 105
Collector v. Day, 11 Wall. 113..... 15
Cross v. Burke, 146 U. S. 86.....98, 100
Dillon v. Gloss, 256 U. S. 365.....3, 16, 17, 95, 96
Fox v. Ohio, 5 How. 410..... 72
Genesee Chief, The, 12 How. 443..... 99
Gibbons v. Ogden, 9 Wheat. 1.....13, 47
Grossman, Ex parte, 267 U. S. 87.....15, 16
Gunn v. Barry, 15 Wall. 610..... 72
Hawke v. Smith, No. 1, 253 U. S. 221.....3, 86, 93, 94
Hylton v. United States, 3 Dall. 171..... 91
Juilliard v. Grossman, 110 U. S. 421..... 13
Kansas v. Colorado, 206 U. S. 46,
25, 72, 73, 74, 79, 80, 104, 105
Keith v. Clark, 97 U. S. 454..... 18
Kenyon v. Knights Templar, 122 N. Y. 247..... 68
Legal Tender Cases, 12 Wall. 457..... 13
Leser v. Garnett, 258 U. S. 130.....77, 81, 83, 86
Marbury v. Madison, 1 Cranch. 137.....44, 59, 69, 72, 97
Martin v. Hunter's Lessee, 1 Wheat. 304.....? 18
McCulloch v. State of Maryland, 4 Wheat. 316.....
18, 19, 20, 30, 44, 53, 57, 74, 72, 77, 79, 99
Milligan, Ex parte, 4 Wall. 2.....60, 72, 73
Munn v. Illinois, 94 U. S. 113..... 72
National Prohibition Cases, 253 U. S. 350.....3, 95, 96, 97
New Jersey v. Palmer, 253 U. S. 350.....96, 97
Orleans v. Phoebus, 11 Pet. 175..... 99
Pacific Ins. Co. v. Soule, 7 Wall. 433..... 91
Poindexter v. Greenhow, 114 U. S. 269..... 72
Pollock v. Farmers L. & T. Co., 157 U. S. 586.....91, 99
Pollock v. Farmers L. & T. Co., 158 U. S. 601..... 91

PAGE

Popovici v. Agler, 280 U. S. 379 ..... 13, 14
Prigg v. Pennsylvania, 16 Pet. 539 13
Reed v. Insurance Co., 95 U. S. 23 68
Rhode Island v. Mass., 12 Pet. 657 13
Rhode Island v. Palmer, 253 U. S. 350 ..... 96, 97, 98
Scholey v. Rew, 23 Wall. 331 91
South Carolina v. United States, 199 U. S. 437 17
Springer v. United States, 102 U. S. 586 91
Turner v. Williams, 194 U. S. 279 ..... 72, 73, 104
United States v. Cruickshank, 92 U. S. 542 88
United States v. More, 3 Cranch. 159 ..... 98, 100
United States v. Sanges, 144 U. S. 310 ..... 98, 100
Veazie Bank v. Fenno, 8 Wall. 533 91
Virginia v. Tennessee, 148 U. S. 503 ..... 14, 15
Virginia Coupon Cases, 114 U. S. 269 62
Wells, Ex parte, 18 How. 307 16
Yarbrough, Ex parte, 110 U. S. 651 17

CITATIONS OF ARTICLES OF THE CONSTITUTION.

Preamble 1, 7, 55, 62
Art. I, Sec. 8 15
Art. I, Sec. 10 14
Art. II, Sec. 2 15
Art. III, Sec. 2 13
Art. V 3, 4, 6, 9, 11, 12, 16, 17, 26, 31, 32, 40, 41, 42, 45, 48, 49, 50, 51, 52, 66, 67, 69, 76, 77, 78, 81, 87, 94, 101, 102

AMENDMENTS.

1-8 ..... 8, 12, 53, 55, 63, 88
9 ..... 8, 12, 53, 55, 65, 88
10 ..... 2, 4, 7, 8, 9, 12, 44, 46, 54, 55, 56, 65, 66, 69, 70, 71, 72, 74, 76, 77, 78, 80, 81, 83, 88, 93, 94, 101, 102, 104
11 ..... 12, 62, 88

PAGE

12 ..... 12, 88
13 ..... 2, 12, 89, 90
14 ..... 12, 88
15 ..... 12, 88
16 ..... 2, 12, 89, 90, 91
17 ..... 12, 89
18 ..... 2, 4, 6, 9, 10, 11, 12, 59, 83, 85, 86, 87, 92, 93
19 ..... 2, 12, 88

Statutes.

Statutes at Large.

Vol. 1, p. 97 84
Vol. 1, p. 402 84
Vol. 2, p. 306 84
Vol. 13, p. 567 84
Vol. 14, p. 358 85
Vol. 15, p. 346 85
Vol. 36, p. 184 85
Vol. 37, p. 646 85
Vol. 40, p. 1050 85
Vol. 41, p. 362 86
Sec. 256 Judicial Code 13

Miscellaneous Citations.

Agrippa, Letter of 58, 68
Annals of Congress 45, 46, 47, 48, 64, 66, 67, 68, 77, 82
Benton's Abridgment 61
Black, Jeremiah, Arg't. in Ex parte Milligan 103
Carroll, Daniel 65, 66, 67, 70, 71, 95
Congressional Globe 90
Congressional Register 64, 82
Curtis, Const. History 69, 90
Elliot's Debates, Vol. 2 ..... 43, 44
Elliot's Debates, Vol. 4 21

PAGE

Elliot's Debates, Vol 5.
21, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 43
Ellsworth Oliver 27, 30, 33, 34, 36
Farrand, Vol. 1 21
Farrand, Vol. 2 58
Farrand, Vol. 3 ..... 21, 29, 42
Federalist, The 21, 30, 43, 44, 49, 98, 126
Ford, Essays on the Constitution 28, 58, 68
Gerry, Elbridge 34, 36, 38, 98
Hamilton, Alexander 37, 38, 39, 43, 44, 49, 51, 98
Hartley 46, 47
Hughes, C. J. 26, 53
Jameson, The Constitutional Convention 27, 31
Lecompton Constitution 75
Lincoln, Abraham 71, 72, 74, 90, 105
Madison, James 38, 39, 40, 42, 45, 46
Mason, George 28, 33, 35
Messages and Papers of the Pres'ts 61
Morris, Gouverneur 37
Pinckney, Charles 33
Pinkney, William 70
Randolph, Edmund 32, 38
Rhodes History of the U. S. 90
Rutledge, John 39
Sherman, Roger 36, 38, 39, 65, 68, 70, 71, 82, 83, 85, 95
Tucker 47
Washington, Pres't 60, 61, 71
Webster, Daniel 72
Wilson, James 34, 43
Winthrop, James 58, 68, 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA, Appellant, vs. WILLIAM H. SPRAGUE and WILLIAM J. HOWEY, Appellees.	No. 606.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

Corrections of Inaccuracies and Omissions in Appellant's Statement of the Case.

1. In addition to the provisions of Article V of the Constitution and Amendment X, the provisions of the Preamble to the Constitution are directly involved, reading:

> "We The People of the United States, in order to form "a more perfect Union, establish Justice, insure domes- "tic Tranquillity, provide for the common defence, pro- "mote the general Welfare, and secure the Blessings of "Liberty to ourselves and our Posterity, do ordain and "establish this Constitution for the United States of "America".

2. Also, having direct bearing on the meaning of Article X of Amendments are the provisions of Article IX of Amendments, which reads:

> "The enumeration in the Constitution, of certain "rights, shall not be construed to deny or disparage "others retained by the people".

3. More remotely involved are the provisions of Articles XIII, XVI and XIX of Amendments (printed at length in Appendix A), which the appellant, in its brief, claims to be of the same character as Article XVIII, as giving the government added direct powers over the people. With this proposition we take distinct issue in each instance.

4. The resolution of Congress proposing the XVIII Amendment is also material and reads as follows:

> "Resolved by the Senate and House of Representatives "of the United States of America in Congress assembled "(two thirds of each House concurring therein) that the "following amendment to the Constitution be, and hereby "is proposed to the States, to become valid as a part of "the Constitution when ratified by the legislatures of "the several States as provided by the Constitution".
>
> "Section 1. After one year from the ratification of "this article the manufacture, sale or transportation of "intoxicating liquors within, the importation thereof "into, or the exportation thereof from the United States "and all territory subject to the jurisdiction thereof for "beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several States shall "have concurrent power to enforce this article by appro- "priate legislation.
>
> "Section 3. This article shall be inoperative unless it "shall have been ratified as an amendment to the Con- "stitution by the legislatures of the several States, as "provided in the Constitution, within seven years from "the date of the submission hereof to the States by the "Congress."
>
> 40 U. S. Statutes at Large, 1050.

Particular attention is called to the express proposal "to the States", a feature of importance in which this proposal differs from every other proposal of an amendment ever submitted.

5. We point out also that the indictment charges *purely intra-State* acts, and makes no claim of breach of any Revenue Law. Neither the power to control inter-State Commerce nor the power to tax can be invoked.

The question is purely concerning the power of the Federal Government to exercise powers over intra-State possession and transportation of beer with an alcoholic content in excess of ½ of 1 per cent by volume.

6. The grounds of the motion to quash, while of the general character mentioned, were specific and detailed, and appear at length in the record.

Statement of the Questions Involved.

The argument of the Government is based upon four contentions, viz.:

(a) The matter is foreclosed from consideration by the decisions of this Court in *Hawke* v. *Smith*, 253 U. S. 221, *Dillon* v. *Gloss*, 256 U. S. 368, and the *National Prohibition Cases*, 253 U. S. 350.

(b) Article V of the Constitution gives clear and unreviewable power to Congress to adopt either method of ratification (convention or legislature) for an amendment thereto, regardless of the nature or purpose of the amendment.

(c) The language of Article V is clear on its face and permits of no interpretation other than that given to it by the Government.

(d) Since all amendments prior to the Eighteenth have been ratified by the legislative method, this is a practical construction of Article V which should be followed by this Court.

The answer of the appellees is:

(a) This Court is not foreclosed from consideration of the points raised by us.

First, because the points and the arguments we make were not presented in any of the three cases cited by the Government;

Second, because this Court is never foreclosed from reviewing its own decisions; and

Third, because if the Eighteenth Amendment is unconstitutional, and the Court is so convinced, it will so declare, regardless of any previous utterance.

(b) The true construction of Article V is dependent on the intention and purpose of those who proposed and adopted it, and on the general aim and purpose disclosed by the Instrument.

It is necessary to consider the nature of the varying powers delegated to the National Government.

The sources from which those powers are derived—

The limited powers delegated by the people.

The fact that the States could not transfer their own governing powers over the people to the National Government—they held them only to exercise.

The history of the growth of Article V.

It is obvious that unless Article V grants such power no legislature is or ever has been competent to delegate to the United States any new direct governing power over the people.

Article V was neither intended nor understood to confer any such power. It was drawn with a totally different purpose, as is clearly shown by the history of its adoption. The privilege of Congress to select a method of adoption has to conform to the nature of the amendment.

(c) The language and the history of the Tenth Amendment confirm this view of the meaning of Article V and clarify any doubts which may exist as to the construction of the language of that article, and the reservation in the Tenth Amendment reserves to the people the sole power to adopt any amendments granting

further powers over themselves or their rights and this power can be exercised only by the people assembled in conventions in their several States.

(d) No prior amendment to the Constitution presented the question involved in the Eighteenth Amendment, i. e., a grant of new powers to the Federal Government over the people and their rights. Hence, the practice followed on the first seventeen amendments has no bearing upon the question.

Never before, since the adoption of the original Constitution, has such an issue been squarely presented to this Court.

(e) The questions as to any proposed amendment are:

What is the nature of the power granted?

Is it one which legislatures are competent to grant?

Is it one reserved to *the people*, as distinguished from one reserved to the States? If it is of the former character, then adoption by State legislatures is insufficient to give validity.

Summary of the Argument.

I.

THE FIRST QUESTION IS WHETHER THE PROVISION IN ARTICLE V OF THE UNITED STATES CONSTITUTION PROVIDING FOR THE RATIFICATION OF AMENDMENTS "BY THE LEGISLATURES OF THREE-FOURTHS OF THE SEVERAL STATES, OR BY CONVENTIONS IN THREE-FOURTHS THEREOF, AS ONE OR THE OTHER MODE OF RATIFICATION MAY BE PROPOSED BY THE CONGRESS" CONFERS ARBITRARY DISCRETION UPON CONGRESS TO SELECT AGENCY OF RATIFICATION, OR WHETHER THE AGENCY TO BE SELECTED IS DEPENDENT UPON THE NATURE OF THE AMENDMENT.

II.

THE MEANING OF ANY PART OF THE CONSTITUTION IS TO BE DETERMINED BY THE PURPOSE AND INTENT OF THOSE WHO FRAMED AND ADOPTED IT, AND IN THE LIGHT OF THE INSTRUMENT AS A WHOLE.

III.

UNDER THE AMERICAN THEORY OF GOVERNMENT ULTIMATE SOVEREIGNTY RESIDES IN THE PEOPLE, AND THEY ALONE (THROUGH CONVENTIONS) WERE COMPETENT ORIGINALLY TO CREATE THE NATIONAL GOVERNMENT, AND THEY ALONE AT THAT TIME COULD HAVE CONFERRED UPON HE NATIONAL GOVERNMENT THE POWER ATTEMPTED TO BE DELEGATED BY THE EIGHTEENTH AMENDMENT.

IV.

LEGISLATURES AND CONVENTIONS WERE NOT EQUALLY REPRESENTATIVE OF THE PEOPLE. THE LEGISLATURES REPRESENTED THE STATES ALONE; THE CONVENTIONS REPRESENTED THE PEOPLE; AND INDEED FOR THE PURPOSE OF RATIFICATION *WERE* THE PEOPLE. THERE WAS A PROFOUND DISTRUST OF LEGISLATURES, A CONSISTENT ASSERTION THAT THEY WERE NOT COMPETENT TO BIND THE PEOPLE, AND AN UNWILLINGNESS TO TRUST THE PEOPLE'S RIGHTS TO THEIR ACTION.

V.

THE FACE OF THE CONVENTION RECORD ITSELF SHOWS THAT THE FINAL FORM OF ARTICLE V, PROVIDING FOR RATIFICATION OF AMENDMENTS EITHER "BY THE LEGISLATURES OF THREE-FOURTHS OF THE SEVERAL STATES, OR BY CONVENTIONS IN THREE-FOURTHS THEREOF, AS ONE OR THE OTHER MODE OF RATIFICATION MAY BE PROPOSED BY THE CONGRESS" WAS NEVER INTENDED SO TO BE READ AS TO MAKE THE LEGISLATURES COMPETENT TO GRANT TO THE UNITED STATES NEW AND DIRECT POWERS OF GOVERNMENT OVER THE PEOPLE OR THEIR RIGHTS, OR TO ENABLE CONGRESS TO CHOOSE THE LEGISLATURES AS AGENTS FOR THAT PURPOSE.

VI.

THE VIEW THAT ARTICLE V WAS NEVER INTENDED TO ENABLE LEGISLATURES TO DELEGATE TO THE UNITED STATES NEW DIRECT POWERS OF GOVERNMENT OVER THE PEOPLE IS CONFIRMED BY REFERENCE TO AND INDEED IS THE ONLY VIEW CONSISTENT WITH THE PREAMBLE AND THE GENERAL SPIRIT AND PURPOSE OF THE INSTRUMENT. AND THAT VIEW WAS PUBLICLY URGED IN ORDER TO SECURE ADOPTION OF THE CONSTITUTION.

B.

THE RESERVATION IN THE TENTH AMENDMENT ELIMINATES ANY POSSIBILITY OF POWER OF THE LEGISLATURES TO ADOPT AMENDMENTS GRANTING TO THE NATIONAL GOVERNMENT ANY ADDITIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS.

VII.

ASIDE FROM THE QUESTION WHETHER WHAT WE URGE IS THE TRUE CONSTRUCTION OF THE LANGUAGE OF THE ORIGINAL INSTRUMENT, THE HISTORIC FACT THAT THIS WAS THE INTENTION OF THOSE WHO ADOPTED IT IS IMPORTANT IN ITS BEARING ON THE ADOPTION, THE CONSTRUCTION AND THE TRUE INTERPRETATION OF THE TENTH AMENDMENT.

VIII

THE WHOLE GREAT STRUGGLE OVER THE ADOPTION O
THE CONSTITUTION (SAVE ONLY IN RHODE ISLAND AN
QUESTIONABLY, IN NEW YORK) WAS NOT OVER WHETHER
NATIONAL GOVERNMENT, A MORE PERFECT UNION, SHOU
BE CREATED, BUT OVER WHETHER *THE* CONSTITUTION
PROPOSED SHOULD BE ADOPTED WITHOUT BEING FIR
AMENDED SO AS TO PROVIDE EXPRESSLY THAT THE NE
GOVERNMENT SHOULD HAVE NO POWER TO ACQUIRE AD
TIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS B
YOND THOSE EXPRESSLY CONFERRED ON IT BY THE OR
INAL INSTRUMENT WITHOUT EXPRESS CONSENT OF TH
PEOPLE. IT WAS ONLY BY PUBLIC PROMISES THAT SU
AMENDMENTS WOULD BE MADE THAT ADOPTION BY THE FI
FTH OF THE REQUISITE NINE STATES WAS SECURED.

ALTHOUGH IT WAS GENERALLY THEN ASSUMED THAT TH
POWER OF AMENDMENT WAS LIMITED BY THE TERMS OF TH
PREAMBLE, AS URGED IN POINT VI, THE IMPORTANCE OF E
PRESS LIMITATION OF THE POWER OF AMENDMENT SO THA
NO OTHER CONSTRUCTION COULD EVER BE PLACED ON T
WAS SPECIFICALLY ASSERTED.

THE FIRST TEN AMENDMENTS WERE ADOPTED FOR TH
EXPRESS PURPOSE OF SAFEGUARDING THE PEOPLE AGAIN
IN THESE RESPECTS.

IX

THE PHRASEOLOGY OF THE TENTH AMENDMENT WAS D
LIBERATELY ALTERED BY CONGRESS BEFORE IT WAS SUBMITTED
SO AS EXPRESSLY TO PREVENT ANY POSSIBLE POWER O
LEGISLATURES TO ADOPT AMENDMENTS GRANTING AD
ADDED POWERS OVER THE PEOPLE AND THEIR RIGHT
WHICH ADDED POWERS CAN ONLY IN THE LAST OF THE FI
FTH THE RESERVATION TO THE PEOPLE DID NOT MEA
ACTING BY VOTES OF THE LEGISLATURES BUT MEANT AC
ING IN AND THROUGH CONSTITUTIONAL CONVENTIONS
CHOSEN FOR THE PURPOSE.

FOR OVER A CENTURY THIS IDEA PERMEATED THE DE
SIONS OF THIS COURT AND THE DECLARATIONS OF TH
GREATEST CONSTITUTIONAL LAWYERS.[1]

(1) *All ten of the amendments adopted were deliberately drawn*
override any and all provisions of the original instrument which mig

enlarge the freedom of the people or enable the new government to pass usual powers over the people and their individual rights, and were purposely put in general terms to avoid any direct alteration of the language of the original instrument.

(2) Carroll's alteration of the original draft of the X Amendment asserted the supreme powers of the people as distinguished from those of the States.

(3) Roger Sherman's correction pointed the X Amendment directly at the amending powers granted by the V Article.

X

THE TENTH AMENDMENT LIMITED THE FIFTH ARTICLE OF THE CONSTITUTION BY WIPING OUT ANY POSSIBLE POWER OF STATE LEGISLATURES TO ADOPT ANY AMENDMENT GRANTING ANY FURTHER POWERS THAT CAN ONLY IN THE GIFT OF THE PEOPLE AND BY RESERVING TO THE PEOPLE THEMSELVES THE SOLE POWER TO ADOPT ANY SUCH AMENDMENT, A POWER TO BE EXERCISED BY THEM ACTING IN CONVENTIONS OF THE PEOPLE ASSEMBLED IN THEIR SEVERAL STATES IN THE MANNER PROVIDED IN ARTICLE FIVE.

XI

THE PROVISIONS OF ARTICLE FIVE DID NOT DECLARE THAT THE LEGISLATURES WOULD BE AGENTS OR REPRESENTATIVES OF THE PEOPLE IN VOTING ON AMENDMENTS. THE POWER TO CALL UPON THEM TO ACT WOULD ACT IN CONVENTIONS. THE METHOD OF ADOPTION BY LEGISLATURES WAS AN ALTERNATIVE METHOD OF ADOPTION WITHOUT REFERRING THE AMENDMENT TO THE PEOPLE. THUS WAS THE UNDERSTANDING AT THE TIME AND WAS EXPRESSLY DECLARED IN CONNECTION WITH THE RESERVATION TO THE PEOPLE MADE BY THE TENTH AMENDMENT.

XII

IN THE CASE OF THE EIGHTEENTH AMENDMENT ESPECIALLY THE LEGISLATURES COULD NOT CLAIM TO ACT IN BEHALF OF OR AS REPRESENTATIVES OF THE PEOPLE BECAUSE IT WAS EXPRESSLY PROPOSED TO THE STATES

XIII

NO OTHER AMENDMENT TO THE CONSTITUTION HAS INVOLVED THE QUESTION HERE PRESENTED NOR WILL THE VALIDITY OF ANY OF THE OTHER AMENDMENTS BE IMPAIRED BY AN AFFIRMANCE IN THIS CASE.

XIV

THE QUESTION OF POWER NOW PRESENTED HAS NOT BEEN ADJUDGED OR CONSIDERED BY THIS COURT. IT HAS BEEN PASSED SUB SILENTIO IN ALL PREVIOUS CASES DEALING WITH THE EIGHTEENTH AMENDMENT AND THEY DO NOT CONCLUDE THE QUESTION.

XV

OF THE OPINION OF THE COURT BELOW

XVI

THE CONTENTIONS HERE PRESENT ARE OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE. THE EIGHTEENTH AMENDMENT IS MERELY THE INSTRUMENT THAT PRESENTS THE BASIC QUESTION OF THE CONTROL OF THE LIBERTIES OF THE PEOPLE AND THE POWERS INTRINSICALLY RESERVED TO THEM BY THE TENTH AMENDMENT.

CONCLUSION

AS THE EIGHTEENTH AMENDMENT HAS NEVER BEEN ADOPTED BY THE PEOPLE TO WHOM ALONE WAS RESERVED THE POWER TO GRANT ANY SUCH ADDITIONAL POWERS OVER THEMSELVES OR THEIR RIGHTS TO THE NATIONAL GOVERNMENT, CONGRESS HAD NO POWER TO ENACT OR ENFORCE THE STATUTORY PROVISIONS UNDER WHICH THIS INDICTMENT IS FRAMED. THE PROVISIONS OF THE ACT ON WHICH THE INDICTMENT IS PREDICATED ARE THEREFORE UNCONSTITUTIONAL. CONSEQUENTLY NO CRIME AGAINST THE UNITED STATES IS CHARGED BY THE INDICTMENT.

THE JUDGMENT QUASHING THE INDICTMENT MUST, THEREFORE, BE AFFIRMED.

POINT I.

The first question in this case is whether the provision in Article V of the United States Constitution, providing for the ratification of amendments "by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress" confers arbitrary discretion upon Congress to select the agency of ratification, or whether the agency to be selected is dependent upon the nature of the amendment.

The following propositions are, we think, not arguable, nor are they questioned; we state them merely to clarify the approach to the real question. If, however, any attack is made upon the validity of these propositions, ample support for them will be found in the succeeding points of the brief.

(1) The United States is a government of delegated and enumerated powers limited to those specifically conferred upon it by the Constitution and those necessarily implied. No power could exist in the National Government to prohibit or regulate the manufacture or sale or the *intrastate* transportation of intoxicating liquors except by virtue of an amendment to the Constitution of the United States duly proposed and ratified, conferring this new and additional power. The Eighteenth Amendment is a purported grant of such new and additional power.

(2) The Eighteenth Amendment is the first instance, since the adoption of the Constitution in 1789, in which an attempt has been made to confer upon the United States new and additional direct powers of government and control over the people themselves or over their rights. As our argument de-

velops it will be realized that the novel character of the amendment is of fundamental importance. Such a grant of additional direct powers of government over the people is to be distinguished from changes in the framework of government, from surrender or limitations of powers of the States as such, or from new guarantees of protection and benefit to the people against discrimination or usurpation by the National or State Governments. We shall later argue that the Nineteenth Amendment is not within these latter classes.

[illegible] At the time the Constitution was adopted such a grant of power as that purported to be given by the Eighteenth Amendment could only have been conferred upon the United States by consent of the people themselves in convention assembled. It could not have been granted by the legislatures which were regarded as representatives of the States in their corporate capacities and not of the people thereof. Such a power can be granted today by the legislatures if it emerge only from the people themselves in conventions assembled. [illegible] Congress is authorized to propose amendments to the Constitution, whether from the people to the legislatures or to make such grants of direct powers over them to the National Government.

Accordingly, the first question presented in this appeal is whether Article V [illegible] gives to Congress a discretion in Congress to select legislatures or conventions as the agencies of ratification, or whether it is the meaning of this clause that Congress must provide for ratification by legislatures in relation to certain classes of amendments and ratifications by conventions as to other classes of amendments, depending upon the nature and character thereof.

POINT II.

The meaning of any part of the Constitution is to be determined by the purpose and intent of those who framed and adopted it and in the light of the instrument as a whole.

The real intent of the provisions of the Constitution, when ascertained, controls over the literal sense of the words and the terms employed

Juilliard v. Greenman, 110 U. S. 421, 439;
Legal Tender Cases, 12 Wall. 457;
Gibbons v. Ogden, 9 Wheat. 1, 188;
Prigg v. Pennsylvania, 16 Peters 539, 610, 611;
Rhode Island v. Mass., 12 Pet. 657, 721.

This Court will readily recall the numerous instances in which it has disregarded the literal wording of the Constitution because sufficient proof was presented to it that the literal language was inconsistent with the purpose and intent of those who framed and adopted it.

Article III, Section 2, declares that

> "the judicial Power shall extend . . . to all Cases affecting Ambassadors, other public ministers and Consuls."

> "In all cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original jurisdiction."

The constitutional provision was supplemented by provisions in the Judicial Code, Section 256 giving exclusive jurisdiction to the federal courts of all suits and proceedings against "Ambassadors or other public ministers, or their domestics or domestic servants, or against Consuls and Vice Consuls". This language can hardly be more clear and less ambiguous, yet in *Ponoroff v. Taylor*, 280 U. S. 379, it was

held that state courts were not excluded from jurisdiction over a suit against a Vice Consul and citizen of a foreign country for divorce and alimony. Mr. Justice Holmes said (p. 383):

> "The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it was reasonable to suppose that the language was used. . . . If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes." (Italics ours.)

Article I, Section 10, of the Constitution provides that

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State."

Could there be language more clear than this? Yet in Virginia v. Tennessee, 148 U. S. 503, which was a case involving the validity and effect of an agreement between those two States for the location of their boundary line, it was held by this Court that the prohibition was not to be literally construed and did not invalidate the compact made.

> "The terms agreement or compact taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects, to those to which the United States can have no possible objection, or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control." (pp. 517-518.)

Then the Court illustrates instances in which the United States would not be concerned with such compacts and continues:

"If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

We can only reply by looking at the object of the constitutional provision, and construing the terms 'agreement' and 'compact' by reference to it." (p. 519) (Italics ours.)

Article I, Section 8, declares that "The Congress shall have power to lay and collect Taxes, Duties, Imposts and Excises". The only limitations in the Constitution upon this power are that direct taxes shall be apportioned among the several States according to their respective numbers (modified, of course, by the Sixteenth Amendment), and that duties, imposts and excises shall be uniform throughout the United States. Nevertheless, in *The Collector* v. *Day*, 11 Wall. 113, this Court held a general income tax invalid when it was attempted to be applied to the salary of a State judge. This Court said:

"It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government." (p. 127.)

Article II, Section 2, of the Constitution declares that "The President • • • shall have Power to grant Reprieves and Pardons for offences against the United States, except in cases of Impeachment". In *Ex parte Grossman*, 267 U. S. 87, the question was whether this power extended to a criminal contempt against a federal court. The Court said:

> "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention who submitted it to the ratification of the Conventions of the Thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary." (pp. 108-109.)

The Court quoted to the same effect from *Ex parte Wells*, 18 How. 307, 311.

Then the Court went into the history of the consideration by the Convention by which this phraseology was formulated, and said:

> "We have given the history of the clause to show that the words 'for offences against the United States' were inserted by a Committee on Style, presumably to make clear that the pardon of the President was to operate upon offenses against the United States as distinguished from offenses against the States. *It can not be supposed that the Committee on Revision by adding these words or the Convention by accepting them, intended sub silentio* to narrow the scope of a pardon from one at common law or to confer any different power in this regard on our Executive from that which the members of the Convention had seen exercised before the Revolution." (p. 113.) (Italics ours.)

Dillon v. Gloss, 256 U. S. 368, was a case which involved the construction of the Fifth Article of the Constitution itself and the validity of the Eighteenth Amendment. In proposing the amendment Congress had declared that it should be inoperative unless ratified within seven years. It was asserted that nothing in the Constitution conferred the power upon Congress thus to limit the time within which ratification might be made. (p. 371.)

> "It will be seen that this article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress. What, then, is the reasonable inference or im-

plication? Is it that ratification may be had at any time, as within a few years, a century, or even a longer period; or that it must be had within some reasonable period which Congress is left free to define? Neither the debates in the Federal convention which framed the Constitution nor those in the state conventions which ratified it shed any light on the question.

* * * * * * *

"*That the Constitution contains no express provision on the subject is not in itself controlling; for with the Constitution, as with a statute or other written instrument, what is reasonably implied is as much a part of it as what is expressed*" (Italics ours).

See also:

Ex parte Yarbrough, 110 U. S. 651, 658;

South Carolina v. United States, 199 U. S. 437, 451.

We believe that the provision in Article V for ratification by legislatures or conventions "as the one or the other Mode of Ratification may be proposed by the Congress" is no more to be construed literally than these other provisions of the Constitution upon which the Court has had occasion to pass, if it appears clearly that such a literal construction is inconsistent with the declarations, purpose and intention of those who framed and adopted the Constitution, and with the fundamental theory and structure of our government.

Nor can the true construction of the powers conferred by the terms of Article V be reached by considering it separate and apart from the general aim and purpose of the instrument declared in the Preamble.

POINT III.

Under the American theory of government ultimate sovereignty resides in the people, and they alone (through conventions) were competent originally to create the National Government, and they alone at that time could have granted to the National Government the power attempted to be delegated by the Eighteenth Amendment.

It is a fundamental concept of our system of government that all sovereignty ultimately resides in the people themselves and that the United States in its existing form could have been created only by consent of the people and not by action of the States in their corporate capacities. Nor is it only the National Government which draws its existence from the people; the ultimate sovereignty in every State lies also in the people.

> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 402-405 (See also Argument of Pinckney, ibid. 377);
> *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, 325;
> *Barron* v. *Baltimore*, 7 Peters 242, 247, 249-250;
> *Keith* v. *Clark*, 97 U. S. 454, 475-476.

The following quotation from Chief Justice Marshall's opinion in *McCulloch* v. *Maryland* sums up the factors which are particularly pertinent in this case (pp. 402-405):

> "In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

"It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. *They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.* It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

"*From these Conventions the constitution derives its whole authority.* The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

"It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted

its government does not remain to be settled in this country. Much more might the legitimacy of the general government be disputed had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, in order to form a more perfect union, it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

"The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." (Italics ours.)

We accept the following points in the statement of the Chief Justice:

(1) The Constitution and the National Government were not the creations of the States, but of the people themselves.

(2) The people acted through conventions; the conventions in the several States were the people.

(3) The government so formed was a government, not of the people of the various States, but of the people of the Nation as a whole.

(4) The assent of the States in their corporate capacities to the Constitution and the National Government was implied in their submission of the Constitution to the people in their respective State conventions.

(5) Though the people of the respective States had already created State sovereignties, they had the power to resume and modify the powers delegated to those governments.

(6) The powers which the people had delegated to the States were to be exercised by the States, themselves, and

not by a distinct and independent sovereignty created by themselves. The States were incompetent to transfer their own powers to another government.

(7) The States, as such, could create a league such as the Confederation, but they could not create a new Nation "possessing great and sovereign powers, and acting directly on the people." Such a government must be created and such powers must be derived directly from the people.

Here is firsthand testimony as to the political philosophy and implications underlying our constitutional system. Were there any question of its accuracy, every statement is amply confirmed by the debates in the constitutional convention, in the State conventions for ratification and the writings of the publicists of that period.

In the Constitutional Convention:

5 Elliot's Debates, 130, 352-356 (App. B);
5 Elliot's Debates, 352-356;
1 Farrand, 122-123, 126-127 (App. C);

Publicists:

The Federalist:
XXXIX,
XLIII,
XLIX

State Conventions:

2 Elliot, 457-458; (App. B);
4 Elliot, 328; (App. C).

First Congress:

3 Farrand, 371; (App. C).

The application of these principles to the present case is of fundamental importance. It shows that such powers as those purported to be conferred upon the United States by

the Eighteenth Amendment could, in the original Constitution, have been granted only by the people themselves acting through conventions, and that the States and their legislatures would not have been competent to make such a grant.

It will tend to clarity of thought if we stop for a moment and apply the principles laid down by Chief Justice Marshall to the practical situation which existed in 1787, when the Constitution was in the process of formation. Precisely to what extent was it necessary to go to the people for the creation of the new government? What elements of power in the new government lay solely within the gift of the people themselves? What relations had these principles to further surrenders and delegations of power, to be made by future amendments. (The same analyses will be of aid, when, later, we analyze the nineteen amendments and show that, if our construction of Article V is sound, only the Eighteenth Amendment required resort to the people in conventions.)

There were thirteen sovereign States, each independent and supreme within its own territorial jurisdiction. They had entered into a Confederation, and created machinery for the operation of that Confederation, such as a Congress and the power of that Congress to levy requisitions on each State for the support of the central government. The Confederation was not a Nation; it was a League. The document by which it was created was not a Constitution but a Treaty.

When it was desired to form a true Nation, what grants or provisions had to be included for the creation of that Nation, and whence were these elements to be derived? We think it evident that there were five separate and distinctive groups of provisions, of differing character, and derivable from two different sources.

(1) First, there must be a *framework* of the new government, a *machinery* through which the powers to be given

to it would function. Its creation was within the power of the States, and of the legislatures as their representatives. It was precisely what they had done in the formation of the Confederation.

(2) Then it was necessary to surrender to the new government certain rights which belonged to the States, as such. These are illustrated by the provisions of Article IV of the Articles of Confederation the agreement that the inhabitants of each State should be entitled to all the privileges and immunities of citizens of the several States, the right to free passage, and the privilege of trade and commerce, the freedom of the National Government from taxation by the States, extradition of criminals, full faith and credit to be given by each State to the statutes and judicial proceedings of others.

(3) But while the States and legislatures were competent in the two aspects just mentioned, the new government would still have been only a Federation or League of States, bound together by a Treaty, any member of which would have had the power to denounce the treaty or any part thereof and secede from the alliance. In order that it might become an indissoluble Union, and a Nation, it was necessary that the assent of the *people* of the states be secured. They alone were competent to transform the Federation into a Nation, and they alone, in their several States, had the power to bind future legislatures so that they could not undo the bond.

This had been a fundamental weakness of the Confederation. The States had entered into solemn obligations with each other, but various States and legislatures had failed or refused to recognize those obligations. Legislative acts subsequent to the Act of Confederation were of greater force than the Act of Confederation itself. So long as the alliance was that of States and of States only, this situation would continue. In order that there might be created a Nation and a Union, power must be derived from those who held power over both States and legislatures—the people.

But it is essential to bear in mind (when we come to Point XIII to test the character of the nineteen amendments) that this action of the people, *once taken*, was complete and final, an indissoluble nation was created. Thereafter the States and legislatures would themselves be competent to ratify amendments which affected merely the framework or machinery of government (and not its powers), or surrendered the rights of the *States* as such.

(4) In addition to these provisions for the framework of the government and the delegation of these powers, it was essential to the successful operation of the new National government that it should have power to operate directly upon the people themselves and upon their rights and property. The Confederation did not possess this power. The legislatures were not competent to grant to a new Nation the right, for example, to levy taxes directly upon their inhabitants. The same lack of power ran through the entire Confederation.

To procure these direct powers over the people it was necessary to go to the people themselves.

The purported grant of power contained in the Eighteenth Amendment is of this class. *To confer this power upon the United States when the Nation was formed, it would have been essential to procure the direct consent of the people through their conventions.*

(5) **There is a fifth class of provisions made necessary by reason of this grant of direct governmental power over the people—those which safeguard the people from usurpation and tyranny by the new National Government after the grant to it of direct power over them. So long as there existed merely a federation or league, the confederation could not invade the States and oppress the inhabitants. But as soon as the people gave to the new Government power over themselves, then it became subject to abuse, and for that reason they demanded the equivalent of the Bills of Rights which they had placed in their State constitutions.**

The people were not satisfied with the few safeguards contained in the original instrument. They believed them inade-

quate. As a result of this fear the first ten amendments were demanded and adopted.

Provisions of this kind could be adopted by legislatures. There were in them no grants of power over the people.

It must be borne in mind that even after the Constitution was adopted, the new government was still one of limited enumerated powers. If further grants of power or future changes were desired, who was competent to make them?

It must be evident that, unless there was express provision to the contrary, the *residuum* of powers remained with those who originally possessed them, States or the people, as the case may be. If no provision for amendment were made in the Constitution conferring upon the States or legislatures the future right to grant powers over the people, *then for new powers over the people the National Government must resort anew to the people themselves*. This, we think cannot be questioned.

The thought of the fathers was the same thought which this Court expressed through Justice Brewer in *Kansas v. Colorado*:

> "All powers of a National character which are not delegated to the National Government by the Constitution are reserved to the people of the United States" (206 U. S. 46, 90).

We come, then, to the inquiry whether the framers of the Constitution, and the State Conventions which adopted it, intended, by the provision in Article V quoted at the beginning of this point, to transfer to the legislatures the power thereafter to delegate to the United States new direct governmental powers over the people and their rights, though until then the legislatures were incompetent in this field, and though it was precisely to this end that every safeguard and protection for the people was sought.

POINT IV.

Legislatures and conventions were not equally representative of the people. The legislatures represented the States alone; the conventions represented the people, and indeed for the purpose of ratification were the people. There was a profound distrust of legislatures, a consistent assertion that they were not competent to bind the people, and an unwillingness to trust the people's rights to their action.

[illegible]

continuous and consistent denial of competence in the legislatures to speak for, or bind, the people in the grant of powers to the new National Government. Chief Justice Hughes, in an address made to the American Bar Association and their foreign guests, at Chicago in 1930, stated the historical fact as follows:

> "The founders sought to establish representative government, but they had a profound distrust of legislatures." (New York State Bar Association Bulletin, October, 1930, p. 433).

We regret that the limitations of time have made it impossible to prepare a complete index of the expressions of this sentiment in the Convention. They will be found throughout the whole body of the debates. Not a subject

...pose where the participation of state legislatures was proposed but that some delegate voiced the universal distrust. We quote illustrative passages, but we must reiterate and emphasize the fact that the total volume of such expressions is overwhelming in its significance.

We are indebted to the learned Court below for a quotation from Jameson, "The Constitutional Convention", pages ...

... The framing of this constitution may be summed up ... as an attempt to fit an adaptation to the exigencies of ... government, in the United States, ... principles of ... as derived from our ... • • •

... the most oppressive, experienced by them as ... of the House of Parliament, a popular ... in fact, representing the ... of the whole empire, might not have given us ... these expressions, especially of ... the power of ordinary legislation ... and that the enactments are exposed by the *English* ... to annulment for violating the organic law?

... *the apprehension, which existed at the time of our separation from the mother country, of the attempts of the Revolution to seek some other depository of the latter power. This they found in the governments in force in the several colonies, invested, in point of structure and organization, after the Revolutionary Conventions, with all the powers of sovereignty, but clothed with the single function of making and altering their municipal laws, and of conforming to the ordinary course of legislation.*"

Oliver Ellsworth, later Chief Justice of the United States, voiced the universal attitude towards legislatures.

> "It proves the honesty and patriotism of the gentlemen who composed the general Convention, that they chose to submit their system to the people *rather than the legislatures, whose decisions are often influenced by men in the lowest departments of government, who have possibly political views of their own to promote, least*

they should be injured by its operation. I would not wish to exclude from a State Convention those gentlemen who compose the higher branches of the assemblies in the several states, but choose to see them stand on an even floor with their brethren, where the artifice of a small number cannot negative a vast majority of the people.

"*This danger was foreseen by the Federal Convention*, and they have wisely avoided it by appealing directly to the people" (Ford, Essays on the Constitution, 139-140; Letters of a Landholder, 1).

Distrust of the legislative branches of the State governments and the feeling that they were not representative of the people pervaded the entire constitutional debate. The representatives in Congress ought to be chosen by the people, so that they should be truly representative.

From the debate in the Federal Convention:

"Col. Mason. Under the existing Confederacy, *Congress* represent the *states, and not* the *people of the states; their acts operate on the states; not on the individuals.* The case will be changed in the new plan of government. *The people will be represented:* they ought therefore to choose the representatives. The requisites in actual representation are, that the representatives should sympathize with their constituents; should think as they think, and feel as they feel; and that for these purposes they should be residents among them. Much, he said, had been alleged against democratic elections. He admitted that much might be said; but it was to be considered that no government was free from imperfections and evils; and that improper elections, in many instances, were inseparable from republican governments. But compare these with the *advantage of this form, in favor of the rights of the people—in favor of human nature.* He was persuaded there was a better chance for proper elections by the people, if divided into large districts, than by the state legislatures. *Paper money had been issued by the latter, when the former were against it. Was it to be supposed that the state legislatures, then, would not send to the national legislature patrons of such projects, if the choice depended on them?*" (5 Ell. Deb. 161).

"Mr. Dickinson considered it essential that one branch of the legislature should be drawn immediately from the people, and expedient that the other should be chosen by the legislatures of the states" (5 Ell. Deb. 163).

"Mr. Pierce was for an election by the people as to the first branch, and by the states as to the second branch; by *which means the citizens of the states would be represented both individually and collectively*" (5 Ell. Deb. 163).

So, in debating the method of choosing the executive, it was said:

"The existing authorities in the states are the legislative, executive, and judiciary. The appointment of the national executive by the first was objectionable in many points of view, some of which had been already mentioned. He would mention one which of itself would decide his opinion. *The legislatures of the states had betrayed a strong propensity to a variety of pernicious measures.* One object of the national legislature was to control this propensity. One object of the national executive, so far as it would have a negative on the laws, *was to control the national legislature, so far as it might be infected with a similar propensity*" (5 Elliot's Debates, 364).

The quotation given from Jameson above contains a key to the problem. The entire legislative history of England had been a warning to the peoples of the new States against a general grant of power to their legislatures. Their distrust was intensified by their own experience during the thirty years preceding the adoption of the Constitution. Distrust of Parliament had occasioned the Revolutionary War, and the colonists were keenly alive to the methods by which the Crown controlled members of Parliament when it could not control the views of the people.

And the same experience had been repeated with the colonial legislatures. These, except in Connecticut and Rhode Island, had sided with the Crown in the Revolution. This distrust of their own colonial legislatures, growing out of their attitude, led to the immediate adoption of new state

constitutions in the majority of the States. These new constitutions departed entirely from the English theory of a supreme parliament, declared the people to be sovereign and the legislatures their servants, and restricted the powers of the legislatures so that they might never have the power to interfere with the rights of freemen.

In the face of this history and evidence, proponents of the Eighteenth Amendment must sustain the burden of proof that members of the conventions intended to grant away to the legislatures for all future time, through the power of amendment of the United States Constitution, every right and safeguard which the people had established and every power which they had carefully reserved to themselves.

So the discussion is replete with evidence that when action of the *people* was required, it was to be taken through conventions. For the purpose of constitutional action the legislatures were states; Conventions were the people.

Marshall, C. J. so declared in the quotaton which we have already given from *McCulloch* v. *Maryland*, *supra*, pp. 18-20. He spoke with personal knowledge of the constitutional philosophy.

So Jameson and Ellsworth; quoted earlier in this Point.

So throughout the debates on the mode of ratification excerpts from which are given in appendix B, See especially Ellsworth's motion to refer to the legislatures for ratification 5 Elliot's Debates, 352-356 (*infra*, *pp.* 113-119).

So Madison, both in the debates (Appendix C) and in the Federalist (see especially XLIII Appendix C).

In all these references it will be observed that ratification by the legislatures was not sufficient, *because they represented the states;* ratification by conventions was requred because ratification *by the people* was essential, *and conventions were the people.*

In this respect, as we pointed out in our analysis of his opinion, the learned judge below was in error. He treated legislatures and conventions as equally representative of the people, failing to observe that in Constitutional action, this is not true, as his own quotation from Jameson shows.

POINT V.

The face of the convention record itself shows that the final form of Article V, providing for ratification of amendments either "by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress", was never intended so to be read as to make the legislatures competent to grant to the United States new and direct powers of government over the people or their rights, or to enable Congress to choose the legislatures as agents for that purpose.

How did Article V receive its final form? What is there in the debates and the sequence of its development which throws any light upon its meaning? Did the delegates consider that unless there was included the provision for ratification of amendments by legislatures, those legislatures had no power to delegate new direct governmental powers over the people to the United States? And if they did consider this, did they intentionally confer that new power upon the legislatures? Or was this clause in Article V an insertion made as part of a revision, with an entirely different purpose? And if this be the fact, does the clause necessarily confer such a new and extraordinary power upon the legislatures, or is there another more reasonable reading of the clause?

In Point II, we gave consideration to those cases wherein this court has declined to give a literal interpretation to constitutional provisions. We quoted the decisions in which this court, in dealing with other important provisions of the Constitution, has referred to the debates and surrounding circumstances to ascertain the true meaning of the provision. We shall follow the same course here.

To ascertain the true significance of Article V the debates on the provision for amendment must read in their entirety and, furthermore, they *must be read in connection with the debates on the provision for ratification of the Constitution itself* because these two discussions ran side by side throughout the convention, and the principles which control one are very pertinent to the meaning of the other.

We have printed the debates on these provisions in their chronological sequence in Appendix B. Their importance can only be appreciated by reading them as a whole. For us to attempt to summarize them would destroy their significance. Accordingly, we shall call the court's attention to the salient features to be observed and refer the court to the Appendix.

We have already observed (Point III) that the States were competent to surrender certain classes of powers to the new government, but for those which directly affected the people and their rights recourse must be had to the people in convention. The necessity of recourse to the people was emphasized again and again in the debates, and motions to refer the Constitution to the legislatures for ratification were overwhelmingly defeated. *Obviously, amendments must come from the same source as original powers unless the convention deliberately included a provision intended to accomplish a different result.*

Article V finds its genesis in Resolution 13 of the Randolph Plan. That Resolution was confined to a declaration

> "that provision ought to be made for the amendment of
> "the Articles of Union whensoever it shall seem neces-
> "sary"

but the Congressional assent thereto should not be required.

No procedural requirements and no source of the amending power is mentioned. But the Randolph Plan is predicated on the principle that the new government must go to the people for a delegation of power if it is to be successful, and, accordingly, that the Constitution must be ratified by conventions of the people.

The Randolph resolution as to amendment is to be contrasted with that in the (supposed) Pinckney Plan, which read:

> "ART. XVI.—If two-thirds of the legislatures of the "states apply for the same the legislatures of the United "States shall call a convention for the purpose of amend-"ing the Constitution; or, should Congress, with the con-"sent of two-thirds of each House, propose to the states "amendments to the same, the agreement of two-thirds "of the legislatures of the states shall be sufficient to "make the said amendments parts of the Constitution."

This is significant because this Article XVI of the Pinckney Plan appears never again to have been considered in connection with the final Article V of the Constitution. Despite the similarity to the clause in Article V with which we are now concerned, the Pinckney draft definitely was not the source of that clause.

The earlier debates on the Randolph resolutions are significant in their declarations upon the necessity of going to the people for approval of the Constitution. But we shall not comment in detail upon those debates preceding July 23d. On that day the resolution for ratification by the people was taken up.

> "Mr. ELLSWORTH moved that it be referred to the legis-"latures of the States for ratification. Mr. Patterson sec-"onded the motion."

Issue was immediately joined upon this proposed change from ratification by conventions to ratification by the states. The debate which ensued is of vital importance. It commences:

> "Col. MASON considered a reference of the plan to the "authority of the people as one of the most important and "essential of the resolutions. The legislatures have no "power to ratify it. They are the mere creatures of the "state constitutions, and cannot be greater than their "creators. And he knew of no power in any of the con-

"stitutions—he knew there was no power in some of them "that could be competent to this object. Whither, then, "must we resort? To the people, with whom all power "remains that has not been given up in the constitutions "derived from them? It was of great moment, he ob- "served, that this doctrine should be cherished as the "basis of free government."

Mr. Gerry took the opposite view, and while his contribution to this particular debate is of no great importance, it is vital because of the proposal which he subsequently made that all amendments should be submitted to legislatures and not to conventions for ratification.

Mr. Madison's position is of importance, too, because it was he who finally proposed the system for amendment which is incorporated in Article V.

"Mr. MADISON thought it clear that the legislatures "were incompetent to the proposed changes. These "changes would make essential inroads on the state con- "stitutions; and it would be a novel and dangerous doc- "trine that a legislature could change the constitution "under which it held its existence. There might indeed "be some constitutions within the Union which had given "a power to the legislature to concur in alterations of "the federal compact. But there were certainly some "which had not; and, in the case of these, a ratification "must of necessity be obtained from the people. He "considered the difference between a system founded on "the legislatures only, and one founded on the people, to "be the true difference between a *league* or *treaty* and a *"constitution."*

The expressions quoted are typical of the entire debate.

The motion to refer the plan to legislatures for ratification was lost seven to three.

The original plan to refer the Constitution to conventions was adopted nine to one.

Following this, a Committee of Detail reported a draft based on the resolutions as adopted. It contained these clauses:

"*We, the people* of the states of New Hampshire, "Massachusetts, Rhode Island and Providence Planta-"tions, Connecticut, New York, New Jersey, Pennsyl-"vania, Delaware, Maryland, Virginia, North Carolina, "South Carolina, and Georgia, do ordain, declare and "establish the following Constitution for the govern-"ment of ourselves and our posterity:" (pp. 376-377).

"Art. XIX.—On the application of the legislatures "of two-thirds of the states in the Union, for an amend-"ment of this Constitution, the legislature of the United "States shall call *a convention for that purpose*" (p. 381).

"Art. XXI.—The ratification of the *conventions* of "* * * states shall be sufficient for organizing this Con-"stitution" (p. 381).

"Art. XXII.—This Constitution shall be laid before "the United States in Congress assembled, for their "approbation; and it is the opinion of this Convention, "that it should be afterwards submitted to *a convention* "chosen in each state, under the recommendation of its "legislature, in order to receive the ratification of such "convention" (p. 381).

Article XIX, proposing amendments by a convention, was taken up on August 30th. It was agreed to *nem. com.*

At this stage then the convention was definitely committed to amendments solely by conventions.

Then there followed debates on Articles XXI, XXII and XXIII, all of which involved ratification of the Constitution itself by conventions. The debate is significant for its confirmation of the views in the earlier discussion that ratification by conventions was essential and for the defeat of Gouverneur Morris's motion to omit the words "conventions of the", so that the States might pursue their own mode of ratification.

Up to this point then both amendments and the original document were to go to conventions of the people.

On September 10th, the entire instrument having been debated,

"Mr. GERRY moved to reconsider Article 19, viz.:

"On the application of the legislatures of two-
"thirds of the states in the Union, for an amendment
"of this Constitution, the legislature of the United
"States shall call a convention for that purpose."

As the outcome of this motion for reconsideration, Article V received its present form. The record, therefore, may be considered in some detail.

The following objections were advanced to Article XIX in its then form:

Gerry: The Constitution is to be paramount to the States' Constitutions. Two-thirds of the States may obtain a convention, a majority of which could bind the entire nation.

Hamilton: The method of amendment was not sufficiently easy: Congress ought to have the power to propose changes by a two-thirds vote of each house.

"There could be no danger in giving this power, as the
"people so finally decided in the case."

Madison: The clause "called a convention for the purpose" is too vague, "because it does not provide how the convention is to be formed nor by what rule it is to decide nor what are the force of its acts".

Sherman: He proposed an addition to the article, so that Congress might propose

"amendments to the several states for their approbation;
"but no amendments shall be binding until consented to
"by the several states."

This was immediately amended to permit the consent of three-fourths of the States. It must be understood that what Sherman was emphasizing here was unanimity of consent to amendments, and it was on that that attention was directed. We shall find him later attempting to remove the three-fourths provision both as to legislatures and conventions; attempting to add a proviso that no State should ever be

affected in its internal police or deprived of equal suffrage in the Senate, without its consent; and on failure in these two attempts he moved to strike out Article V. entirely.

With the record in this condition Madison proposed an entire substitute. It reads:

> "The legislature of the United States, whenever two-
> "thirds of both Houses shall deem necessary, or on
> "the application of two-thirds of the legislatures of
> "the several states, shall propose amendments to this
> "Constitution, which shall be valid, to all intents and
> "purposes, as part thereof, when the same shall have
> "been ratified by three-fourths, at least, of the legis-
> "latures of the several states, or by conventions in
> "three-fourths thereof, as one or the other mode of
> "ratification may be proposed by the legislature of
> "the United States."

It was seconded by Mr. Hamilton, and amended by consent to provide that no amendments prior to 1808 should affect certain sections of the VII Article, and then appears the entry:

> "On the question on the proposition of Mr. Madison
> "and Mr. Hamilton as amended:
>
> > "Massachusetts, Connecticut, New Jersey, Pennsyl-
> > "vania, Maryland, Virginia, North Carolina, South
> > "Carolina, Georgia—ay, 9; Delaware—no, 1; New
> > "Hampshire, divided (pp. 530-532).

Here then is Article V to all intents and purposes in its present form. Here we have the complete history of its revision.

What is its significance?

Here was a sudden eruption of dissatisfaction with Article XIX. But what were the causes of this dissatisfaction? They were:

(1) That a majority of the convention could amend the Constitution.

(2) That only State legislatures and not Congress could propose amendments.

(3) That the terminology "call a convention for the purpose" was too vague.

(4) That amendments might be proposed to the States but only for unanimous ratification. This proposal was made by Sherman. The only portion of his motion which attracted attention was his requirement of unanimity; but that was immediately changed to require a three-fourth consent only.

Madison's substitute clause incorporates these changes. It permits Congress to propose amendments on a two-thirds vote (Hamilton's suggestion); it permits a proposal of amendments on the application of two-thirds of the legislatures (the original provision); it declares those amendments valid when ratified by three-fourths of the legislatures of the several states; it permits ratification by conventions in three-fourths of the states (continuing the convention system but inserting procedural rules which Madison desired); and then it introduces one new phase, never suggested or debated, that Congress should propose one or the other mode of ratification.

Is it possible to say that this substitute proposal, passed nine to one, without debate, was intended or understood to accomplish a complete and radical change in the distribution of powers as between the States and the people, and thereafter to vest in the legislatures the right to delegate to the United States those direct powers of government over the people and their rights which the convention had so insistently declared they were incompetent to grant?

We say this construction is impossible.

Hamilton declared the amendment to be a safe one, "*as the people would finally decide in the case.*" He was speaking precisely of such changes as are now in discussion. They must secure the approval of the people in convention.

Madison himself, who proposed the change, was throughout the whole history of the constitutional debates the strongest proponent of the view that the legislatures were incompetent to grant governmental powers over the people to the

United States, and that such delegation must come from the people themselves in convention.

For the convention in this manner to have taken away from the people all future control over the delegation of their rights and liberties to the United States, and to have vested it for the future in legislatures—which they consistently declared were not the representatives of the people but only of the states—and of which they as consistently declared their mistrust—would have amounted to a stultification of their views, expressed throughout the months of these debates, and an abandonment of the whole philosophy upon which they predicated the Constitution.

Before we develop this point in all its detail, we shall examine the subsequent attempts to amend Article V.

On September 15th the convention was considering the Constitution in its final form. Article XIX, as it was when the Madison form was adopted had now been renumbered as Article V.

Sherman again expressed his fear of vesting the power of amendment in three-fourths of the states.

Then he moved to strike out of Article V the words "three-fourths" both in their application to legislatures and to conventions. His motion was defeated seven to three.

Then Gerry moved to strike out the words "*or by conventions in three-fourths thereof*". *He was defeated ten to one.*

(Gerry it was who subsequently denied that there was any distinction between legislatures and conventions as representatives of the people in constitutional matters—See 1 Annals of Congress 716, quoted in the appellant's brief, p. 17. In this respect his declaration is inconsistent with the whole majority view in the convention and with Marshall's declaration in *McCulloch* v. *Maryland*, *supra*, and with the action of the convention in voting down his amendment to exclude conventions from action on amendments. It is also to be noted that Gerry it was who refused to sign the Constitution.)

Then Sherman, persistent in his idea that amendments should be unanimously accepted, proposed "that no State

shall, without its consent, be affected in its internal police or deprived of its equal suffrage in the Senate". The motion was lost eight to three.

Then he moved to strike out Article V altogether. The motion was lost eight to two.

Of all the delegates to the convention, Madison was the most emphatic in the view that the consent of the people themselves was essential for the grant to the new national government of direct powers over the people or their rights, and that this was the factor in the new government which made ratification by the legislatures impossible. Yet if the appellant's reading be accepted, *Madison himself proposed to permit the legislatures thereafter to grant away these rights which he so strongly asserted lay only in the grant of the people themselves.*

In the Appendix, we have set forth a number of the expressions of Madison made in the course of the debates during the constitutional convention, and in his numbers of the Federalist, which dispose of any possibility that he may have intended by the language of this draft to vest in the legislatures any power to grant to the United States new direct governmental powers over the people.

To those who framed the Constitution the rights of the States as such and the rights of the people were two distinct and different things. Throughout their debates they had two objects foremost in their minds. First, to create an effective National Government, which should avoid the weaknesses of the Confederation, and secondly, to protect the people and their rights from usurpation and tyranny by government. States' rights and people's rights were to be kept separate and distinct. When we come in later points to the consideration of the first ten amendments we shall find that this second ground was the gauge of battle over which the adoption of the Constitution was fought. And yet, Article V, construed literally, might lead to the result that the safeguards and the protection theretofore afforded to the people and their individual rights and liberties were placed forever

beyond their control and within the domination of the legislatures of the States, whom they distrusted, and against which they so carefully guarded themselves.

But this reading of Article V is not necessary. There is an alternative reading, reasonable and consistent with the purpose and philosophy of the convention.

The meaning of the resolution in the light of the debates is evident, that there were certain instances when ratification of new amendments by the legislatures would be perfectly proper—those instances where the machinery of government was changed without affecting its powers, or where the rights of the States as such were delegated or restricted, or where further protection was afforded to the people and their rights—but, on the other hand, there were other instances where the reference should be to the people themselves—when it was proposed to grant new powers of government directly affecting the people or their rights. Up to this time the method of amendment had been solely by convention; there was no reason why conventions should be called in the first class of cases; in our opinion it is indisputable from the record that those engaged in the work of framing the Constitution never intended by this change, agreed upon without debate, to permit the legislatures for the future to act where they were incompetent to act in the adoption of the Constitution and where the framers so frequently declared that they were to be distrusted.

But if the resolution is read in the light of the proceedings of the convention as a whole, its reasonable meaning cannot be doubted—that it provided alternative forms indeed, but alternatives to be used each in their proper sphere, well understood and well defined, which Congress was to select, not as a matter of discretion, but purely as a ministerial or administrative act.

POINT VI.

The view that Article V was never intended to enable legislatures to delegate to the United States new direct powers of government over the people is confirmed by reference to, and indeed is the only view consistent with, the Preamble and the general spirit and purpose of the instrument. And that view was publicly urged in order to secure adoption of the Constitution.

Which reading of Article V is consistent with the Preamble of the Constitution, with the understanding of the instrument as a whole in the State conventions, and with the provision in the Tenth Amendment, declaring that

> "the powers not delegated to the United States by the "Constitution, nor prohibited by it to the states, are "reserved to the states respectively, *or to the people*."

The overriding importance of the debates in the State Conventions for purposes of interpretation of the Constitution has been nowhere better stated than by Madison, in the following words, in the House of Representatives:

> "But, after all, whatever veneration might be enter- "tained for the body of men who formed our Constitu- "tion, the sense of that body could never be regarded as "the oracular guide in expounding the Constitution. As "the instrument came from them it was nothing more "than the draft of a plan, nothing but a dead letter, "until life and validity were breathed into it by the "voice of the people, speaking through the several State "Conventions. If we were to look, therefore, for the "meaning of the instrument beyond the face of the in- "strument, we must look for it, not in the General Con- "vention, which proposed, but in the State Conventions, "which accepted and ratified the Constitution."
>
> 3 Farrand's Records, p. 374.

The Preamble in express words declared the dominant purpose of the instrument "to secure the blessings of liberty to ourselves and our posterity".

This dominant purpose was repeatedly declared in the National Convention of 1787, and assumed by all its members.

5 Elliot's Debates, 127, 162, 355, *et passim.*

The great Federalist leaders had no conception that they had, by the particular language of the V Article placed all individual constitutional rights, guarded in almost every State from any interference by the State legislatures, at the mercy of the legislatures of other States. They asserted openly that these rights were fully guarded by the facts that the new Government would have only specifically delegated powers, and that the people were the recognized source from which alone further powers over themselves and their rights could come.

In the Pennsylvania Convention, the first to act, the declarations to that effect of Wilson, who had been almost foremost in the National Convention, are constant.

2 Elliot's Debates, 434-435, 436, 443-444, 453-455, 456-458, 478-479, 497-498, 502, 523.

His final declaration on the subject is worth quoting:

> "The late Convention were assembled to devise some "plan for the security, safety and happiness of the peo- "ple of the United States. If they have devised a plan "that robs them of their power, and constitutes an aris- "tocracy, they are the parricides of their country and "ought to be punished as such."

2 Elliot's Debates, 523.

Hamilton, combating the idea that any express reservation of the people's rights was needed, both in the New York Convention (2 Ell. Deb. 230) and in the Federalist (Cap. LXXXIV), spoke along similar lines, saying in the latter:

"Here, in strictness, the people surrender nothing; "and as they retain everything they have no need of "particular reservations. 'We the people of the United "'States, to secure the blessings of liberty to ourselves "'and our posterity do *ordain* and *establish* this Con- "'stitution for the United States of America.' This is "a better recognition of popular rights than volumes of "those aphorisms which make the principal figure in "several of our State Bills of Rights".

How could Hamilton have made such a statement to the people of the State of New York, in the most important document in favor of adoption, if he for a moment construed the instrument as providing that the people of New York by adopting the Constitution would be surrendering to the legislatures of ten other States the power to abrogate the constitutional rights of the citizens of New York? Nor was the Federalist merely a declaration of Hamilton, great as he was. It was the statement of the proponents of the Constitution as to its meaning, urged to those who were asked to adopt it, with that meaning attributed to it, that the Preamble controlled and limited all the powers granted by the instrument.

And these general views as to the source of power of the National Government and limits of grants found later expression by Marshall in the Supreme Court.

> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 405; *Marbury* v. *Madison*, 1 Cranch 137, 176.

In the Massachusetts Convention Bowdoin, Parsons, Varnum and Dalton made similar statements.

> 2 Elliot's Debates, 78, 87-88, 93, 141, 162.

These were declarations by those who proposed the Constitution to the people for their acceptance, that it was the intent and purpose of the instrument that there should be no way in which the new Government might gain added or more extended powers over the people without their own consent.

Nowhere are these prevailing opinions of the efficacy of this dominant intent to control the meaning of the particular clauses of the instrument better brought together than in the debates in the House of Representatives, at its first Session, over the form to be adopted in framing the first ten amendments.

Thus we find Madison, the Father of the Constitution, saying over and again during those debates:

"I believe that the great mass of the people who op-
"posed it, disliked it because it did not contain effectual
"provisions against the encroachments on particular
"rights, and those safeguards which they have been long
"accustomed to have interposed between them and the
"magistrates who exercise the sovereign power; nor
"ought we to consider them safe, while a great number
"of our fellow-citizens think these securities necessary.

"It is a fortunate thing that the objection to the Gov-
"ernment has been made on the ground I stated; because
"it will be practicable, on that ground, to obviate the ob-
"jection, so far as to satisfy the public mind that their
"liberties will be perpetual, and this without endanger-
"ing any part of the Constitution which is considered as
"essential to the existence of the Government by those
"who promoted its adoption."

1 Annals of Congress 433.

"It may be said, indeed it has been said, that a bill of
"rights is not necessary, because the establishment of
"this Government has not repealed those declarations of
"rights which are added to the several State constitu-
"tions; that those rights of the people which had been
"established by most solemn act, could not be annihilated
"by a subsequent act of that people, who meant, and de-
"clared at the head of the instrument, that they ordained
"and established a new system, for the express purpose
"of securing to themselves and their posterity the liber-
"ties they had gained by an arduous conflict."

Ibid. 438-439.

"I admit, with the worthy gentleman who preceded
"me, that a great number of the community are solicitous

"to see the Government carried into operation; but I be-
"lieve that there is a considerable part also anxious to
"secure those rights which they are apprehensive are
"endangered by the present Constitution. Now, consid-
"ering the full confidence they reposed at the time of its
"adoption in their future representatives, I think we
"ought to pursue the subject to effect. I confess it has
"already appeared to me, in point of candor and good
"faith, as well as policy, to be incumbent on the first
"Legislature of the United States, at their first session,
"to make such alterations in the Constitution as will give
"satisfaction, without injuring or destroying any of its
"vital principles."

Ibid, 706.

"I appeal to the gentlemen who have heard the voice
"of their country, to those who have attended the debates
"of the State conventions, whether the amendments now
"proposed are not those most strenuously required by the
"opponents of the Constitution? It was wished that
"some security should be given for those great and essen-
"tial rights which they have been taugh to believe were
"in danger. I concurred, in the convention of Virginia,
"with those gentlemen, so far as to agree to a declara-
"tion of those rights which correspond with my own judg-
"ment, and the other alterations which I had the honor
"to bring forward before the present Congress. I ap-
"peal to the gentlemen on this floor who are desirous of
"amending the Constitution, whether those proposed are
"not compatible with what are required by our constitu-
"ents? Have not the people been told that the rights of
"conscience, the freedom of speech, the liberty of the
"press, and trial by jury, were in jeopardy? that they
"ought not to adopt the Constitution until those impor-
"tant rights were secured to them?"

Ibid, 746.

During this debate, it was further observed by Congress-
man Hartley as to the clause guaranteeing freedom of speech
of the press and of assemblage for the common good and the
people's right to apply for redress from grievances, that it

"had been asserted in the convention of Pennsylvania, by "the friends of the Constitution, that all the rights and "powers that were not given to the Government, were "retained by the States and the people thereof. This "was also his own opinion; but as four or five States had "required to be secured in those rights by an express "declaration in the Constitution, he was disposed to "gratify them; he thought everything that was not in-"compatible with the general good, ought to be grant-"ed, if it would tend to obtain the confidence of the people "in the Government; and, upon the whole, he thought "those words were as necessary to be inserted in the dec-"laration of rights as most in the clause."

Ibid, 732-733.

The reference to the "friends of the Constitution in the Pennsylvania Convention" is evidently to the weighty speeches of Wilson in that Convention, to which we have already referred.

Congressman Tucker said:

"But, notwithstanding all these objections to obtain-"ing amendments after the ratification of the Constitu-"tion, it will tend to give a great degree of satisfaction "to those who are desirous of them, if this House shall "take them up and consider them with that degree of "candor and attention they have hitherto displayed on "the subjects that have come before them; consider the "amendments separately, and, after fair deliberation, "either approve or disapprove of them. By such con-"duct, we answer in some degree the expectations of "those citizens in the several States who have shown so "great a tenacity to the preservation of those rights and "liberties they secured to themselves by an arduous, per-"severing, and successful conflict."

Ibid, 758-759.

The general purpose declared in the Preamble governs and limits all provisions of the Constitution.

Gibbons v. *Ogden*, 9 Wheat. 1, 188-189.

Nothing had been more clearly declared in the whole proceedings for the adoption of the Constitution than that the States, as such, had no power to confer governmental powers over the people or their rights on the new Government, and that the State legislatures had no power to act as representatives of the people in granting such powers.

It was equally declared, without contradiction, in 1789, that under the V Article, still unamended, the Legislatures, in adopting amendments pursuant to that Article, acted not as representatives of the people, but as representatives of their respective States. And that opinion was adopted and put in effect by the House of Representatives, at its first session, by a two-thirds vote.

1 Annals of Congress, 766.

And this action of the House was concurred in and adopted by a two-thirds vote in the Senate.

Ibid, 88.

Following out the principles of construction we have been considering, and applying them to the Preamble and the V Article, we find them completely harmonized in entire accord with the dominant intention declared in the Preamble, and with that held out to the Conventions of the People in their several States, by merely regarding the duty and power of Congress in selecting a mode of adoption of amendments as ministerial only, and not as arbitrary and conclusive, but dependent for the efficacy of amendments on their having been adopted by the bodies holding the power to grant what was sought by the amendment, i. e. in regard to rights and powers of the States, which the States might deem it advantageous to surrender, the States themselves acting by their recognized representatives, the State legislatures; in regard to further rights or powers over the people and their rights, the people themselves in Constitutional conventions assembled in their several States.

The great advocate of the federal view, Hamilton, said in relation to the exercise off the amending power:

> "But it is evident, that all conjectures of this kind must "be extremely vague and fallible; and that it is by far the "safest course to lay them altogether aside; *and to con-* "*fine our attention wholly to the nature and extent of* "*the powers, as they are delineated in the constitution,* "*every thing beyond this must be left to the prudence* "*and firmness of the people; and who, as they will hold* "*the scales in their own hands, it is to be hoped, will* "*always take care to preserve the constitutional equi-* "*librium between the general and the state governments.* "Upon this ground, which is evidently the true one, it "will not be difficult to obviate the objections, which "have been made to an indefinite power of taxation in "the United States."
>
> The Federalist, Cap. XXXI.

One culminating fallacy of the appellant's construction of Article V remains still to be observed.

In their own states the people would not trust their legislatures with complete power. The legislatures were hedged about and circumscribed by constitutional limitations.

Neither were the people willing to trust the National Legislature or Congress with unrestricted power. They were not even willing to rely upon the fact that the United States was a government only of delegated powers, and could not exceed the terms of that delegation. They insisted upon specific and express limitations and safeguards. Some of those are expressed in the original Constitution itself; the remainder are to be found in the first ten Amendments.

Yet, the appellant contends that the people, unwilling to trust their own legislatures within the States, and unwilling to trust the National Legislature in the National field, nevertheless consented that the State legislatures might grant away to the National Legislature every right and power which they had safeguarded, or thought they had safeguarded, in the Preamble and in the other provisions of the Constitution. In short, holding firmly to their purpose to safeguard

the rights of the people against aggression by any form of government, National or State, and believing that they had done this, the contention now is made that, by giving the State legislatures power to ratify, the people themselves have abandoned all protection. The logic of the argument is that, though they had intended to safeguard the people against their legislatures, the result they have achieved is to safeguard their legislatures against the people, and to permit the legislatures by their action to take away the people's rights. *For it is clear that if the power of amendment by the legislatures can go to every part of the Constitution, it can go even to amending the Bill of Rights itself.* Thus, legislatures are put upon an equal plane of power with the people themselves and, indeed, may take away the most fundamental rights of the people.

We say that this conclusion can not stand in the light of the history of the Constitution, which we have reviewed. The fundamental principle of that convention was that powers over the people must be derived from the people. Legislatures do not represent the people but only the States; the people act only through conventions. To grant the legislatures power to delegate powers over the people to the National Government would wipe out the distinction between powers possessed by the States and powers possessed by the people. There would then be no rights to be reserved to the people as declared in the Tenth Amendment. Every protection sought in the Constitution and the ten Amendments would be taken from the people and subjected to the power of the legislatures. The legislatures, State and National, lacked the confidence of the framers of the Constitution and those who adopted it. The history of the V Article itself is inconsistent with the interpretation which the appellant seeks to put upon it.

The language of the resolution prepared by Hamilton to express the approval of New York declares the view of those who drafted and adopted the Constitution, beyond the possibility of question or escape.

"We, the delegates of the People of the State of New "York in Convention assembled, having maturely con- "sidered the Constitution for the United States, agreed "to on the 17th day of September, in the year Seventeen "hundred and eighty-seven * * * do declare and make "known, in the name of the people aforesaid, that the "powers granted in and by the said Constitution, being "derived from the People of the United States, may be "resumed by them whenever they shall judge it neces- "sary to their happiness, *that every power not granted "thereby remains either to them or their respective state "governments, to whom they may have delegated the "same; that therefore no right of any kind, either of the "People of the respective states or of the said govern- "ments, can be cancelled, abridged, restrained or modi- "fied by Congress*, or by any officer or department of the "United States, *except in conformity to the powers given "by the said Constitution*, that among other essential "rights the liberty of conscience and of the press cannot "be cancelled or abridged by any authority of the United "States."

1 Works of Hamilton, pp. 500-501.

These declarations of purpose and intent are determinative of the meaning of Article V.

B.

THE RESERVATION IN THE TENTH AMENDMENT ELIMINATES ANY POSSIBILITY OF POWER OF THE LEGISLATURES TO ADOPT AMENDMENTS GRANTING TO THE NATIONAL GOVERNMENT ANY ADDITIONAL POWERS OVER THE PEOPLE OR THEIR RIGHTS.

POINT VII.

Aside from the question whether what we urge is the true construction of the language of the original instrument, the historic fact that this was the intention of those who adopted it is important in its bearing on the adoption, the construction and the true interpretation of the Tenth Amendment.

The debates in the 1787 National Convention, in the State adopting conventions and in the First Congress are replete with statements of this general understanding.

Under this Point we are dealing with the historic fact that the men who adopted the Constitution had no intention of conferring on three-fourths of the legislatures the unlimited power to adopt amendments giving to the new National Government additional powers over the people, beyond those which the people themselves were conferring on it.

That historic fact affords a basis at once for the adoption and for the interpretation of the X Amendment.

Wholly irrespective of the *question of law*, whether by the true construction of the instrument, the dominant aim and purpose, declared in the Preamble, limited and controlled the provisions of the V Article, so as to make it necessary to apply to the true source for any new power sought, stand the

unquestionable historic *facts* that such was the *intention* of those who adopted the Constitution, and such was the representation made to them by the proffererers of the instrument to induce its adoption. The representations and their making are on the record. As to the actual intention, the Chief Justice, less than half a year ago stated publicly in his address before the American Bar Association and their guests at Chicago:

> "The founders sought to establish representative gov-
> "ernment, but they had a profound distrust of legis-
> "latures."

Did they *intentionally* entrust to the distrusted legislatures the absolute power to deprive the people of every one of the highly prized rights they had just preserved by a bloody and exhausting war, from the effects of which they were still gasping?

Is it believable that the freemen of Massachusetts, New York and Virginia, who had by their State Constitutions just forbidden their own legislatures even to touch these sacred rights, knowingly intended to grant the absolute power to wipe out every one of them, to the legislatures of the ten other States, in whose selection, even, they could have no voice.

That such was not the intention in any State was so clear, that Chief Justice Marshall could say, with the approval of the entire Court, concerning matters then within their personal knowledge:

> "Would the people of any one State trust those of
> "another with the power to control the most insignificant
> "operations of their State Government? We know they
> "would not."
>
> *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 431.

Had the instrument been one between private parties, and the Court was of opinion that the language of some one clause of the instrument was so specific and clear that it had to be construed so as to conflict with the real intention, and in

opposition to the representations made as to its meaning in order to induce its adoption, and intention and representations were to like effect, it would be clearly a case where equity in the exercise of its great powers, would reform the instrument to conform to the real intention. The Court has no such power in dealing with the Constitution. But it will, in such a case, look attentively to see if *by subsequent provision* the dominant intention has not been made controlling over the particular phrase, or whether the power that was inconsistent with the real intention of the parties has not been superseded and revoked.

A provision to that effect, susceptible of no other meaning, adequate in its terms, deliberately and specifically made applicable to this power of legislatures to adopt any amendments giving to the National Government additional powers over the people, we find in the X Amendment.

POINT VIII.

The whole great struggle over the adoption of the constitution (save only in Rhode Island and, questionably, in New York) was not over whether *a* National Government, *a* more perfect union, should be created: but over whether *the* constitution as proposed should be adopted without being first amended so as to provide expressly that the new government should have no power to acquire additional powers over the people or their rights beyond those expressly conferred on it by the original instrument, without express consent of the people. It was only by public promises that such amendments would be made that adoption by the people of the requisite nine states was secured.

Although it was generally then assumed that the power of amendment was limited by the terms of the Preamble, as urged in Point IV, the importance of express limitation of the power of amendment, so that no other construction could ever be placed on it, was specifically asserted.

The first ten amendments were adopted for the *express* purpose of safeguarding the people forever in these respects. They must be construed accordingly.

When the Constitution came before the people of the several States for adoption, serious fears were widely entertained that the powers conferred might somehow be used or amplified to endanger the liberties of the people.

Barron v. *Baltimore*, 7 Pet. 243, 250.

All the arguments of Hamilton, Wilson and Madison that the new Government was one of delegated powers only, and that consequently restrictions were wholly unnecessary (and, according to Hamilton and Wilson, even dangerous, through possible implication that any rights not specifically mentioned as reserved would be subject to the National power), could not overcome the resistance on this ground to the adoption of a Constitution which might imperil those "characteristic rights of freemen", which the Revolution had been fought to preserve, and the impregnable fortification of which was the declared purpose of the first ten amendments.

> "It is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States."

Barron v. *Baltimore*, 7 Peters 243, 250.

Contrary to the common impression, the struggle was not (except in New York and Rhode Island) over whether *a* new National Constitution should be adopted, but over whether the Constitution as submitted should be amended *before adoption* so as to safeguard the people and impregnably fortify their rights against any possible encroachments of Federal power.

They specially feared what Justice Bradley later happily described as "neat and skillful manipulation of its words"; and were determined that the prohibitions on extension of the National power over the individual and his rights should be made express.

The great cry was for the incorporation of a Bill of Rights.

It was obvious that the peoples of Massachusetts, Virginia and New York, who would not trust their own legislatures with the power to infringe their dearly bought rights, would be quite unwilling to entrust such power to legislators elected in other States.

As Chief Justice Marshall put it:

> "Would the people of any one State trust those of "another with the power to control the most insignificant "operations of their State government? We know they "would not."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 431.

Nor were our fathers in the several States intentionally building up what was to them a new foreign Parliament, called a Congress, to be able to arrogate to itself the very powers over their individual rights as freemen that they had just successfully denied to King and Parliament combined (associated in most of the States with their own Colonial Government); and which they had later specifically refused, in most of the States, to their own State Governments.

The common criticism was that there was no positive reservation of the rights of individuals.

It was in vain that the leading supporters of adoption of the proposed Constitution without prior amendment urged the impossibility of re-assembling the Convention, or ever otherwise getting together on anything else.

In despair the leaders in favor of adoption openly promised that, if adopted, it would be at once amended to meet the objections raised.

Barron v. *Baltimore*, 7 Pet. 243, 250.

Even with these promises the fears were so serious that it was only by narrow majorities that the Constitution was adopted in State after State.

New York	30	for to	27	against
Massachusetts	187	" to	168	"
New Hampshire	57	" to	46	"
Virginia	89	" to	79	"

The situation under the original Constitution which it was sought to meet by the first ten amendments was threefold.

1. The "characteristic rights of freemen" were not affirmatively guarded or preserved, and the people feared this. Accordingly, we find incorporated and declared, in the first eight amendments, guarantees of fundamental individual rights which had formed the theme of Magna Charta, of the Petition of Right, of the Bill of Rights, and of the Declaration of Independence.

2. Mindful of the point suggested by Hamilton and Wilson that a listing of reserved rights might imply that any others, not specifically listed, might be considered as impliedly subjected to the new Government's power, the Ninth Amendment provided that no such implication should ever be drawn.

3. The point was expressly raised that unless the power of amendment were equally limited, the other safe-guards of the people's rights amounted to nothing.

Winthrop publicly wrote to the Massachusetts Convention:

> "Whatever way shall be chosen to secure our rights, the same resolve ought to contain the whole system of amendment."
>
> Letter of Agrippa, Feb. 5, 1788; Ford, Essays on the Constitution, p. 122.
>
> Cf. 2 Farrand's Records, 630.

If there were such unlimited powers in a few legislatures they could override every one of the reserved rights covered by the first Ten Amendments; they could change the government of limited powers into one of unlimited powers; they could declare themselves hereditary rulers; they could abolish religious freedom; they could abolish free speech and even the right of the people to petition for redress; they could not only abolish trial by jury, but even the right to a day in court.

If there be no limitation on this absolute power of amendment by Legislatures, then, instead of being the great charter of the liberties of the people that it was intended to be, as declared in its Preamble, and as it has always been supposed to be, at least since the adoption of the first Ten Amendments, the Constitution of the United States established the most absolutely despotic power ever conferred on any civilized government, and on one of that worst of all forms, an oligarchy.

None of us believe that any such absolute powers lawfully exist in any little band of legislators exercising Federal functions.

Somewhere in this great charter of liberty, there is something, overlooked in these recent days, even by this Court, which stands in the way of any such despotic powers.

Where and what is that provision?

The principle that such restraints existed somewhere in the instrument was declared by Chief Justice Marshall in the earliest of his opinions expounding the Constitution, in the clause we have quoted.

Marbury v. *Madison*, 1 Cranch 137, 176.

And if we find such provision, and find that this Court overlooked it, that no counsel called attention to it, that the court never adverted to it, that it has passed *sub silentio* in each decision concerning the XVIII Amendment, that it was put into the Constitution for the very purpose of forever

preventing the existence of any such unlimited powers of amendment by any but the people themselves, then we shall have fully demonstrated that the question we present is *res nova*, not foreclosed by any decision that has passed over it *sub silentio*.

It was to safeguard the rights and powers of the people and reserve them to themselves alone, that the first ten amendments were demanded, were proposed and were adopted.

The whole literature of the period of the adoption of the Constitution and the first Ten Amendments is one great testimony to the insistence that the Constitution must be so amended as to safe-guard unquestionably the rights and freedom of the people so as to be secure from any future interference by the new government, or any extension of its powers to matters the people had not already given into its control, unless by their own consent.

Long afterwards in *Ex parte Milligan* (4 Wall. 2, 120), their attitude was summed up by this Court.

Any possible power of the Federal Government to enlarge its own powers over the people by the vote of those who, this Court has said, are exercising a Federal function, had to be curtailed, or every other safe-guard was a mere "scrap of paper". None saw this more clearly than Roger Sherman, James Winthrop and John Marshall.

The First Message of President Washington to Congress, which brought the subject to the attention of the First Congress (which proposed the amendments), contained the following paragraph:

> "Besides the ordinary objects submitted to your care, "it will remain with your judgment to decide how far an "exercise of the occasional power delegated by the Fifth "Article of the Constitution is rendered expedient at the "present juncture by the nature of objections which have "been urged against the system, or by the degree of "inquietude which has given birth to them. Instead of "undertaking particular recommendations on this sub- "ject in which I could be guided by no lights derived

"from official opportunities, I shall again give way to "my entire confidence in your discernment and pursuit "of the public good; for I assure myself that whilst you "carefully avoid every alteration which might endanger "the benefits of an united and effective government or "which ought to await the future lessons of experience, "*a reverence for the characteristic rights of freemen* and "a regard for the public harmony, will sufficiently influ-"ence your deliberations on the question *how far the "former can be impregnably fortified*, or the latter be "safely and advantageously promoted."

1 Messages and Papers of the President (Richardson, 1896), 53.

And the House in its responsive address to the President said:

"The questions arising out of the Fifth Article of the "Constitution will receive all the attention demanded by its importance; *and will, we trust, be decided under the "influence of all the considerations to which you allude.*"

1 Benton's Abridgment, 47.

The Senate likewise in its responsive address to the President said:

"We beg you to be assured that the Senate will, at all "times, cheerfully cooperate in every measure, which "may strengthen the Union, conduce to the happiness, *or "secure and perpetuate the liberties* of this great confed-"erated public."

1 Benton's Abridgment, 13.

The impregnable fortification and the perpetual security of the liberties of the people from encroachment by the Federal Government were thus declared, not only by the demands of State Conventions, and by publicists, but also by the President and by each House of Congress, to be the moving purpose of the amendments the Congress proposed.

It was for these purposes that the first Ten Amendments were proposed and adopted; and they are to be construed in the light of these purposes.

As Justice Bradley wrote concerning the XI amendment, with the concurrence of Justices Waite, Miller and Gray, and without contradiction from the rest of the Court:

> "The Eleventh Amendment is not intended as a mere "formula of words, to be slurred over by subtle methods "of interpretation, so as to give it a literal compliance, "without regarding its substantial meaning and purpose. "It is a grave and solemn condition, exacted by sovereign "States, for the purpose of preserving and vindicating "their sovereign right to deal with their creditors and "others propounding claims against them, according to "their own views of what may be required by public faith "and the necessities of the body politics. *We have no "right, if we were disposed, to fritter away the substance "of this solemn stipulation by any neat and skillful "manipulation of its words. We are bound to give to it "its full and substantial meaning and effect. It is only "thus that all public instruments should be construed.*"
>
> Virginia Coupon Cases, 114 U. S., 269, 332.

Moreover, it was declared in the very Preamble to the Constitution that it was ordained and established by the people of the United States, "*to secure the blessings of liberty to ourselves and our posterity.*"

It was to bring the instrument unquestionably into line with its own declared main purpose of securing the blessings of liberty to ourselves and our posterity that the first Ten Amendments were adopted. And they are to be construed in accordance with that declared purpose of the Constitution and the intention of those who adopted it, and with the declared purposes of their adoption of the ten Amendments, and with the great doctrines of constitutional construction so laid down by Justices Bradley, Waite, Miller and Gray.

POINT IX.

The phraseology of the X Amendment was deliberately altered by Congress before its submission so as expressly to prevent any possible power of legislatures to adopt amendments granting any added powers over the people and their rights, which added powers lay only in the gift of the people. The reservation "to the people" did not mean acting by votes of the legislatures, but meant acting in and through constitutional conventions chosen for the purpose. For over a century this idea permeated the decisions of this Court and the declarations of our greatest constitutional lawyers.

When the first Congress met, the matter of the promised amendments to "fortify impregnably the characteristic rights of freemen" and to "secure the blessings of liberty to ourselves and our posterity" was brought up.

After a prolonged struggle the entire matter of the amendments was referred to the Committee of the Whole, and there finally emerged from that Committee twelve proposed amendments, of which two were later rejected and need not particularly further concern us.

(1) *All ten of the amendments adopted were deliberately drawn to override any and all provisions of the original instrument which might endanger the freedom of the people or enable the new Government to gain added powers over the people and their individual rights, and were purposely put in general form to avoid any direct alteration of the language of the original instrument.*

The framework of the ten is striking.

It had been proposed to go through the Constitution and alter particular phrases here and there, but that method was

deliberately voted down after long debate. The House expressly voted not to attempt to amend any provisions of the original instrument by altering its language.

2. Congr'l Register, 241;
1 Annals of Congress, 766.

Roger Sherman moved the adoption of this method of amendment by overriding provisions, instead of by corrections of the text of the original instrument. He argued:

> "We ought not to interweave our propositions into the "work itself, because it will be destructive of the whole "fabric. We might as well endeavor to mix brass, iron "and clay as to incorporate such heterogeneous articles, "the one contradictory to the other. * * * When an alter- "ation is made in an act, it is done by way of supplement, "the latter always repealing the former in every specified "case of difference."

2 Congr'l Register, 167.

In Committee of the Whole Sherman's motion was voted down on August 13th, 1789 (1 Annals of Congress, 717). But on August 19th, 1789, he renewed his motion on the floor of the House, and after a repetition of the debate it was carried by a two-thirds vote.

2 Congr'l Register, 241;
1 Annals of Congress, 766.

How completely Congress abandoned the former method is apparent on the most casual inspection. No one of the Ten Amendments refers in specific terms to any particular article, section or clause of the original instrument, or attempts to alter a word of the original text.

Nor did either of the two rejected amendments contain any such specific reference, though one, at least, dealt with a subject peculiarly fit for such treatment, the number of members of Congress.

The first eight of the ten are framed to protect from all possible encroachment by the new Government ancient and familiar individual rights declared in Magna Charta, in the Petition of Right, in the Bill of Rights and in the Declaration of Independence.

The Ninth met the point raised by Wilson and Hamilton of possible danger from an enumeration of rights to any right not specifically enumerated, by declaring:

> "The enumeration in the Constitution, of certain "rights, shall not be construed to deny or disparage "others retained by the people."

The whole field of *rights* of individuals was thus covered by the first nine amendments.

The X Amendment had thus nothing left to deal with in the way of *rights*. It, accordingly, does not even mention rights. It deals exclusively with *powers*.

As it emerged from the Committee of the Whole the X Amendment read:

> "The powers not delegated by the Constitution nor "prohibited by it to the States, are reserved to the States "respectively."

Daniel Carroll of Maryland moved to amend this clause by adding the words "or to the people" at the end, and this was at once "agreed to", apparently without debate.

1 Annals of Congress, 761.

Finally, Roger Sherman, who, in the Constitutional Convention of 1787, had vainly striven to limit the amending power (2 Farrand, Records of The Federal Convention, 558, 630) and who, in Congress, had insisted on the general form of emendation (1 Annals of Congress, 766; 3 Congr'l Reg., 241), moved to alter the language of the draft of the X Amendment by inserting the words "to the United States" after the word "delegated", making it read:

"The powers not delegated *to the United States* by the "Constitution, nor prohibited by it to the States, are "reserved to the States respectively, or to the people."

This was unanimously agreed to without debate.

1 Annals of Congress, 768.

And the Tenth Amendment went out in that form and was adopted unanimously.

The Tenth Amendment thus went out designed, deliberately, not to correct, but to override the original text of the Constitution, if anywhere it might be found to conflict therewith.

Under the resolution, adopted on Sherman's own prior motion, the X Amendment could not be framed to alter the text of the V Article. But it could be framed to override any adverse construction. Without departing from that resolution it could not alter the language of the V Article; but it could be put in terms clearly referring to and limiting the method of exercise of the amending power.

That it was the intention to have the X Amendment override the provisions of the V Article, if they were of the unlimited character now claimed, was made clear by the corrections made in its language by the House on the motions of Daniel Carroll and Roger Sherman.

(2) *Carroll's alteration of the original draft of the X Amendment asserted the supreme powers of the people as distinguished from those of the States.*

It is a simple rule of hermeneutics that deliberate alterations of the text must be regarded as strong indications of the intent. Its most familiar application is where written words inserted in a printed form are deemed, in case of conflict between them, to override the printed form.

Where we have, as here, irrefragable proof of the alterations in the draft, the alterations are to be given their full

force, comparing the original text of the amendment with the altered text.

As it emerged from the Committee of the Whole, the X Amendment, filled but a single purpose, *reserving* to the States respectively all governmental powers they had respectively previously possessed, except those delegated by the Constitution, and those thereby prohibited to the States.

Daniel Carroll of Maryland moved to amend the X Article, as drafted, by adding at its end the words "or to the people". Carroll with a clear vision of our basic law and a keen appreciation of the rights of the people and their ultimate sovereignty, was pointing out that the ultimate sovereignty was still to reside in the people, and the State Governments still to be restricted by the prohibitions in their State Constitutions, and the powers of the people still to be reserved to them alone. His point was grasped promptly and his correction agreed to.

1 Annals of Congress, 761.

Something was, then, reserved to the people, as distinguished from the States.

What was it?

If the Fifth Article gave absolute, unlimited and unrestrainable authority to a few legislators to deprive the people of their every right, in spite of the Tenth Amendment, was there anything reserved to the people?

Is there any explanation possible in the face of Sherman's statements in the House and of the House resolution modifying the language of the first ten amendments accordingly, on his motion that the legislatures in adopting amendments acted as representatives of the States and could not act as the representatives of the people (1 Annals of Congress, 708-715, 761-768), that Congress, in adding the words "or to the people", at the suggestion of Carroll, intended deliberately to reserve to the people assembled in conventions, the sole power of granting additional powers over themselves and

their rights as freemen—to *reserve* them to the people alone, where alone that power originally had existed?

We may justly rely on this declaration of Sherman's, still echoing in the House when they agreed to Carroll's correction, as indicating what they meant by "reserved to the people".

> *Reed* vs. *Insurance Co.*, 95 U. S. 23;
> *Kenyon* vs. *Knights Templar Association*, 122 N. Y. 247.

It is not a *grant* to the Legislatures. It is a *reservation* to the original holder.

(3) *Roger Sherman's correction pointed the X Amendment directly at the power of legislatures to adopt amendments granted by the V Article.*

Sherman's own fears had received emphasis from the widespread opposition to the adoption of the unamended Constitution.

He could not have been ignorant of Winthrop's clear statement of the absolute necessity that any reservation of the people's rights, to be really efficacious should "contain the whole system of amendment".

> Letter of Agrippa to the Massachusetts Convention of Feb. 5, 1788; Ford, Essays on the Constitution, p. 122.

Sherman proposed that the X Amendment, as already corrected by the House on Carroll's earlier motion, be further corrected by adding the words "to the United States" after the word "delegated".

> 1 Annals of Congress, 768.

The effect of this limitation is obvious.

It distinguishes sharply between powers delegated "to the United States", and other powers delegated by the Constitu-

tion to other authorites, and *reserves* the latter class "to the States respectively or to the people".

Search the Constitution through, there is but on specific power delegated by it that was not delegated "to the United States", and that was the power of legislatures to adopt amendments, which clearly was not a power delegated "to the United States".

2 Curtis Const'l. Hist'y. 162.

Were that unlimited power of amendment one delegated "to the United States" all the limitations on the National Power, whether express or implied, would have been meaningless.

Marbury v. *Madison*, 1 Cranch, 137, 176.

As long as the method, deliberately adopted, of phrasing amendments by general overriding provisions, instead of by alteration of the language of particular sections and clauses, was adhered to, it would be difficult to make the reservation in this X Amendment more clearly include this amending power mentioned in the V Article.

If, in a bill of sale, starting as one of "all cattle belonging to A" there were inserted after the word "cattle" the words "over two years old", it would seem to be a specific and express exception of those not over two years old.

Sherman's insertion of the words "to the United States" was an equally specific and express reference to the one power delegated by the Constitution which was *not* "delegated to the United States", namely, the power conferred on legislatures by the V Article, to adopt amendments granting additional powers which lay only in the gift of the people. That power was branded and ear-marked.

If the X Amendment did not reserve to the people the sole power to adopt amendments enlarging the powers of the Federal Government over themselves and their rights, what powers were thereby reserved to the people?

Some answer must be made. The reservation was not meaningless.

If the supposed unlimited power of legislatures to amend away all rights of the people was not taken away from them what was left to the people? Their power, their one life-giving part in the government, was the power to fix, delimit and confer the powers delegated to the new government. If *that* power was not *reserved* to them, nothing was "reserved to the people."

> "A power to build up what another may pull down at "pleasure is a power which may provoke a smile but can "do nothing else" (Pinckney, 4 Wheat. 391).

Carroll's correction unquestionably reserved *some* powers to the people. What were those powers unless they were the powers of adopting amendments by which they might delegate added powers over themselves and their rights as freemen?

What possible purpose could Sherman's correction serve other than this of reserving to the people the sole power of adopting any amendments which would give to the new government any added powers over them and their rights?

All the characteristic rights of freemen, subject only to the power of amendment, were, but for this power of amendment, safeguarded by the first nine Amendments. That subject of *rights* had been exhausted, and so the X Amendment drops the subject of *rights* and deals expressly and solely with *powers*, and, by Roger Sherman's correction, specifically with the power of amendment.

Unless the power of amendment by legislatures was likewise limited, those safeguards *of rights* were but "scraps of paper".

The Tenth Amendment thus necessarily reserves to the people the power, which they had had from the beginning, to grant any further powers over themselves and their rights.

By this construction alone do the first ten amendments carry out the purpose of their adoption, openly avowed by

President Washington and by both Houses of Congress, of *fortifying impregnably* the characteristic rights of freemen.

By this construction of the X Amendment alone is the Constitution brought into line with its own Preamble "to *secure* the blessings of liberty to ourselves and our posterity".

By this construction alone is the X Amendment, as corrected by Carroll and Sherman, given force and effect in accordance with its own terms.

By this construction alone is what was intended as a great charter of freedom prevented from becoming a charter of absolute oligarchic despotism.

By this construction alone is *any* force given to the X Amendment.

By this construction alone is *anything* reserved *to the people*.

This provision that only the people can surrender their rights or grant further powers over themselves, is the vital clause that makes this a Government *by the people*. That it was intended to be such a government, that it has been maintained as such a government, that we should maintain it as such, finds no clearer exposition than in the words of Marshall in *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404-405; and in the words of Abraham Lincoln in the Gettysburg Address.

This provision of the X Amendment restricting the amending power is the corner-stone of all our rights and liberties.

Without it the Constitution is not a charter of liberty, but a charter of despotic oligarchic power.

We have seen that *impregnable fortification* of the characteristic rights of freemen, was the demand of the people and the declared purpose of President Washington and of both Houses of Congress; that the necessity of clearly limiting correspondingly the amending power had been declared by Winthrop, and that the intent to do so was specifically involved in Roger Sherman's correction of the wording of the Tenth Amendment, adopted unanimously by the House and Senate.

Satisfied that this work had been accomplished by the ten Amendments, that the Constitution forever protected these rights of freedom, the whole country accepted the Constitution and its exposition by the Supreme Court under the leadership of John Marshall.

For over a hundred years there runs through the opinions of the Supreme Court, the conception that there had been created a government *by* the people, of the people, for the people, and that the sacred rights of freedom which the Revolution had been fought to preserve were safeguarded from any hands but their own. And the like view was voiced by the greatest of our other Constitutional lawyers.

The fears that had been raised by the original instrument had been completely allayed by the adoption of the first Ten Amendments.

Marbury v. *Madison*, 1 Cranch, 137, 176;
McCulloch v. *State of Maryland*, 4 Wheat. 316, 404, 405, 406, 431;
Cohens v. *Virginia*, 6 Wheat. 264, 369;
Barron v. *Baltimore*, 7 Peters, 243, 250;
Fox v. *Ohio*, 5 How. 410, 434;
Ex parte Milligan, 4 Wall. 2, 119-120;
Gibbons v. *Ogden*, 17 Wall. 610, 623;
Munn v. *Illinois*, 94 U. S. 113, 124;
Pembleton v. *Greenhow*, 114 U. S. 269, 291;
Turner v. *Williams*, 194 U. S. 279, 295-296;
Kansas v. *Colorado*, 206 U. S. 46, 89-90.
The Reply to Hayne, 3 Works of Daniel Webster (8th Ed'n.), 340, 346-347.
The Gettysburg Address of Abraham Lincoln.

The embryo of Lincoln's great phrase, "Government of the people, by the people, for the people", which to him embodied the whole theory of freedom, appears in Marshall's opinion in *McCulloch* v. *Maryland* (4 Wheat. 389, 404-405). That the amendments were adopted to put an end to the possibility of encroachments by the general government, and to prevent

any exercise of governmental functions in a manner dangerous to liberty. Marshall declared in *Barron* v. *Baltimore*, 7 Pet. 243, 250.

And this was long afterwards reiterated in *Ex parte Milligan*, 4 Wall. 2, 119-120.

These declarations of the Supreme Court reach their culmination in two of the above-cited opinions written by Justice Brewer:

In a concurring opinion, he wrote, in 1904:

> "Too little effect has been given to the Tenth Article "of the Amendments to the Constitution, that 'the powers "not delegated to the United States by the Constitution, "nor prohibited by it to the States, are reserved to the "States respectively, or to the people'. The powers the "people have given to the General Government are named "in the Constitution, and all not there named either ex"pressly or by implication, are reserved to the people and "can be exercised only by them, or upon further grant "from them."
>
> *Turner* v. *Williams*, 194 U. S. 279, 295.

And this was followed in 1906 by the opinion of the Court (again written by Justice Brewer) in *Kansas* v. *Colorado*:

> "The proposition that there are legislative powers "affecting the Nation as a whole which belong to, "although not expressed in the grant of powers, is in "direct conflict with the doctrine that this is a govern"ment of enumerated powers. That this is such a govern"ment clearly appears from the Constitution, independ"ently of the Amendments, for otherwise there would be "an instrument granting certain specified things made "operative to grant other and distinct things. This "natural construction of the original body of the Con"stitution is made absolutely certain by the Tenth "Amendment. This amendment, which was seemingly "adopted with prescience of just such contention as the "present, disclosed the widespread fear that the National "Government might, under the pressure of a supposed "general welfare, attempt to exercise powers which had

"not been granted. With equal determination the framers intended that no such assumption should ever find "justification in the organic act, and that if in the future "powers seemed necessary they should be granted by "the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to "the United States by the Constitution, nor prohibited "by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the "people.' Its principal purpose was not the distribution of power between the United States and the States, "but a reservation to the people of all powers not "granted. The preamble of the Constitution declares who framed it: 'We, the people of the United States', not "the people of one State, but the people of all the States. "And Article X reserves to the people of all the States the "powers not delegated to the United States. The powers "affecting the internal affairs of the States not granted "to the United States by the Constitution, nor prohibited "by it to the States, are reserved to the States respectively, and all powers of a national character which are "not delegated to the National Government by the Constitution are reserved to the people of the United "States."

Kansas v. Colorado, 206 U. S. 46, 89-90.

In these words is outlined the general line of demarcation between powers that can be surrendered by the States as such, and powers that can be conferred on the National Government by the people alone.

In perhaps the most solemn as well as the noblest words ever penned, Lincoln declared this essential principle:

"That we here highly resolve that these dead shall not "have died in vain; that this Nation, under God, shall "have a new birth of freedom, and that government of "the people, by the people, for the people, shall not perish "from the earth."

Once before in our history the attempt was made to have a majority in Congress and a legislature create a Constitution

for a section of the American people, in the face of their known will, by "neat and skillful manipulation of words" in the Federal Constitution. The fate of the infamous Lecompton Constitution should be an object lesson to those who think that any power save that of the sovereign people themselves, can establish or destroy the constitutional characteristic rights of freemen of this Republic.

The issue we raise is whether this is a government of the people, *by* the people, or an oligarchic despotism where the people have surrendered all their powers to make or unmake the Constitution, reserving to themselves—nothing.

POINT X.

The Tenth Amendment limited the Fifth Article of the constitution by wiping out any possible power of state legislatures to adopt any amendments granting any further powers that lay only in the gift of the people, and by reserving to the people themselves the sole power to adopt any such amendments, a power to be exercised by them acting in conventions of the people assembled in their several states in the manner provided in Article Five.

Just how did the Tenth Amendment affect the Fifth Article? To understand that, we must analyze Article V itself.

First of all it had provided generally for amendments, with two exceptions, one temporary. Second, it had provided two methods of *proposing* amendments, one by Congress itself, whenever two-thirds of both Houses might deem it necessary, and one by the call of a convention on the application of the legislatures of two-thirds of the States. Third, construed literally, and apart, it gave Congress *the option of selecting one* of two alternative methods of adoption of amendments, proposed in either way: (1) by ratification by the legislatures of three-fourths of the States; or (2) by ratification by the people, assembled in conventions in three-fourths of the States; and for adoption in either of these ways.

We contend that any such broad power of selection was impliedly limited by other provisions of the Constitution and expressly limited by the X Amendment.

Whatever construction is put upon it, the Fifth Article does not say, it does not *pretend to say*, that the legislatures in so voting are the agents of the people.

Leser v. *Garnett* (258 U. S. 130) and *Hawke* v. *Smith*, No. 1 (253 U. S., 221) each involve the conclusion that in adopting amendments the legislatures are *not* acting *as agents* of the people. If they were acting *as agents* of the people of

their respective States, the people thereof, their principals, would have the absolute right to limit, control, and direct their action. But this Court says in the above cases that the people of a State cannot in the slightest degree either restrain or regulate the action of members of their legislature on a proposed amendment; not even, for example, by a provision in the State Constitution that they must first hear from the people.

> "The function of a state legislature in ratifying a pro-
> "posed amendment to the Federal Constitution, like the
> "function of Congress in proposing the amendment, is a
> "federal function derived from the Federal Constitution;
> "and it transcends *any* limitations sought to be imposed
> "*by the people of a State.*"
>
> *Lesce* v. *Garnett*, 258 U. S. 130.

The action of legislatures in adopting amendments is the action of the State governments and not the action of the people, as was openly declared to the House just before its corrections of the X Amendment.

> 1 Annals of Congress, 708, 766.

It was with this distinction just drawn, that the House unanimously agreed to the reservation of all the powers not already granted to the Federal Government, "to the States" respectively "or to the people", putting in the last four words as an amendment of the language of the article of amendment.

That assembling in conventions specifically called for the special purpose is the only manner in which the people can act safely, effectively and wisely on such subjects, was declared promptly by the Supreme Court.

> *McCulloch* vs. *Maryland*, 4 Wheat., 316, 403.

Now where does the Tenth Amendment hit this assumed system of amendment provided by the V Article, and just how and in what measure does it affect it?

It does *not* touch the general provision that amendments may be made, or their scope.

It does *not* touch either of the provisions for *proposing* amendments.

It affects *only* the method of *ratification*, or in other words, the power of *adoption* of the amendment.

The word "or" in the Tenth Amendment is distributive and not alternative. Its meaning is absolutely controlled by the word "reserved". You cannot "*reserve*" to any one but the original holder. The powers that had originally belonged to the States, as States were reserved to the States. The powers that had originally belonged to the people, were reserved to the people.

The amendment thus says that if the power to be conferred by an amendment be one that the States, as such, had originally the power to confer, the power to delegate it (that is, the power to adopt the amendment) is reserved to the States respectively, acting by a three-fourths majority. But if the power to be conferred by the amendment is one that the people alone could have granted, the people *reserve* the power to delegate it, and if it can be held that they had ever parted with that power, they resume it and take it away from the legislatures. They *reserve* that power to the people, who thereforth alone can ratify such amendments. How will the people ratify? By the method laid down for their action in Article V, universally understood as the method of action by the people, by the vote of conventions of the people in three-fourths of the States.

The Tenth Amendment is not predicated on the possession or protection of any special particular right of the individual.

Those who ask whether it guarded an inalienable right to drink simply fail to understand the fundamental basis of the Constitution. It was the impregnable fortification *of the right of the citizen not to be interfered with by the general government in matters which the people had not confided to its care.*

It was but another form of the general doctrine of freedom from interference by any government outside the limits of power the people have conferred on it, which is the basic idea of civil liberty.

Even the assumption that such unlimited power to adopt amendments had been conferred on legislatures by Article V did not present the slightest obstacle to the resumption of that power by the people and its surrender by the legislatures. The same question was raised concerning the power of the people to take away from the States, by adopting the Federal Constitution, powers previously conferred by them on their several States, and met this answer:

> "It has been said, that the people had already sur-
> "rendered all their powers to the State sovereignties,
> "and had nothing more to give. But, surely, the question
> "whether they may resume and modify the powers
> "granted to government does not remain to be settled in
> "this country."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404.

By the amendment "reserving" their own powers to the people, deliberately adopted to override any possible previous deputation of that power, they resumed the exclusive possession of that power.

What the Tenth Amendment did to Article V was, thus, to eliminate any possible claim of power of legislatures to grant to the Federal Government added powers over the people and their rights.

The broad line of demarcation between these two classes of powers—those of the people, and those of the States, as such—was laid down by this Court in *Kansas* vs. *Colorado*, in these words:

> "The powers affecting the internal affairs of the States
> "not granted to the United States by the Constitution,
> "nor prohibited by it to the States, are reserved to the
> "States respectively, and all powers of a national char-
> "acter which are not delegated to the National Govern-

"ment by the Constitution are reserved to the people of "the United States."

Kansas vs. *Colorado*, 206 U. S. 36, 90.

Unless that supposed unlimited power of adopting amendments by a handful of legislators was unquestionably denied by the Tenth Amendment, *what was it that was reserved thereby to the people?*

POINT XI.

The provisions of Article V did not declare that the legislatures would be agents or representatives of the people in voting on amendments. The people, if called on to act would act in conventions. The method of adoption by legislatures was an alternative method of adoption without referring the amendment to the people. This was the understanding at the time and was expressly declared in connection with the reservation "to the people" made by the X Amendment.

Were the legislatures, in acting under the V Article, acting as agents of either States or people, they would necessarily be under the control of their principals.

The decisions in *Leser* v. *Garnett*, 258 U. S. 130, and the cases there cited, that State Constitutional provisions regulating the action of the legislature, in voting on a Constitutional Amendment, are void, involve, as a mere corollary, that this is not simply a provision empowering the legislatures to act as representatives and agents of the people in voting on amendments, but an independent alternative method of ratifying amendments, without going to the expense or form of submitting them to the people.

Were the legislature of a State simply the agent of the people of the State in voting on amendments to the National Constitution, the people of that State, *ex vi termini*, could control the action of that agency by provision of their State constitution.

This, it was held in *Leser* v. *Garnett*, the people of a State, and the State itself, could not do; that in voting on amendments the legislatures were *exercising a Federal* function, conferred on them by the V Article, in the exercise of which they were beyond the control of either the State or the people of the State.

The corollary thus involved in these decisions is in direct conformity with the understanding of the House of Representatives at the time it adopted the phraseology of the Tenth Amendment. In the course of the debate leading up to the framing of the amendments, and in the discussion over whether his resolution should be adopted, by which all amendments should be made, not by way of alterations of the language of the original instrument but by passing superseding provisions, Roger Sherman said:

> "The Constitution is the act of the people and ought "to remain entire. But the amendments will be the act "of the State governments."
>
> 1 Annals of Congress, 708.

Later in the course of his argument of this motion he asserted, more at length, that it was impossible to alter the text of the original document, since it ran "We the people * * * do ordain and establish and that would be an untrue statement, if applied to language altered by amendments adopted by legislatures acting merely as "representatives of the States", and not by the people acting in Conventions chosen for the express purpose.

> 1 Annals of Congress, 715;
> 2 Congr'l Register, 176.

No one attempted to dispute this clear statement of Roger Sherman, and it was with this distinction thus sharply brought to its attention in Committee of the Whole, and later reiterated on the floor of the House (id. 766), that the House of Representatives adopted, first, Carroll's amendment adding the words "or to the people" (1 Annals of Congress, 761), making the specific reservation to the people of all their own powers, and, second, Sherman's addition of the words "to the United States" (1 Annals of Congress, 768), making the amendment specifically applicable to the amending powers of legislatures granted by the V Article. These corrections

follow on the heels of this clear and uncontradicted statement in the House, and the resolution adopted to put that contention in effect, that the legislatures in adopting amendment are representing, not the people, but the State governments.

The record of the declaration of the meaning of the term at the time that they adopted it seems conclusive and to that extent in harmony with the conclusion of the Supreme Court in *Leser* v. *Garnett* that, in adopting amendments, the legislatures are acting under power delegated to them by Article V of the Constitution as an alternative method of adoption of amendments, and not as representatives of the people. That decision wholly failed to note the reservation to the people by the X Amendment, and naturally so, since the Court was there dealing with powers lying in the gift of the States.

POINT XII.

In this case of the XVIII Amendment, especially, the legislatures could not claim to act in behalf of or as representatives of the people, because it was expressly proposed "to the States".

The view expressed by Roger Sherman and adopted by the First House of Representatives in 1789, just before correcting the language of the Tenth Amendment—that the legislatures, in adopting amendments, could not act as representatives of the people, but only as representatives of the States—has since been confirmed, both by the action of Congress in proposing, and by the action of practically all of the legislatures in passing resolutions adopting amendments.

Never has Congress referred a proposed amendment to the legislatures *as representatives of the people*.

Never, that we have been able to find, have more than two legislatures ratified a proposed amendment statedly "on behalf of the people".

In a large percentage of the cases the resolutions adopting amendments in various States read that the legislature adopts the amendment in question "*on behalf of the State*".

In most other cases the legislature passes a resolution reading simply that the legislature adopts the amendment.

In but seven instances in all, occurring in three different States on different occasions (out of over two hundred and fifty resolutions examined), have we found language used in the adopting resolution stating or implying that in adopting the amendment the legislature has acted *on behalf of the people* of the State. The seven resolutions of this character are those of the Michigan legislature adopting the XIII, XIV, XV, XVII and XVIII Amendments; that of the Florida legislature adopting the XIII Amendment, and that of the Arkansas legislature adopting the XVII Amendment.

It has been difficult to find these resolution, and, out of twenty or thirty we have been unable to find, there may perhaps be two or more containing such phrases, viz.: the Michigan resolutions on the XVI and XIX Amendments. On the other hand, a large number of the resolutions as to each Amendment state expressly that the legislature adopts and ratifies the amendment "*on behalf of the State*."

The proposal and alleged ratification of the XVIII Amendment presents a situation peculiar to itself and still more remarkable.

The form of the previous Congressional resolutions proposing amendments, up to and including the XVI, had been in substance:

> "Resolved, * * * That the following Article be pro-
> "posed *to the legislatures of the several States* as an
> "Amendment * * * which when ratified by three-fourths
> "of the said legislatures shall be valid as part of the
> "said Constitution."

1 U. S. Stats. at Large, 97 (Amendts. IX);
1 U. S. Stats. at Large, 402. (Amend't. XI);
2 U. S. Stats. at Large, 306. (Amend't. XII);
13 U. S. Stats. at Large, 567. (Amend't. XIII);

14 U. S. Stats. at Large, 358. (Amend't. XIV);
15 U. S. Stats. at Large, 346. (Amend't. XV);
36 U. S. Stats. at Large, 184. (Amend't. XVI).

The resolution submitting the XVII Amendment read simply that

> "the following be proposed as an Amendment to the "Constitution, which shall be valid to all intents and "purposes as part of the Constitution, when ratified by "the legislatures of three-fourths of the States."
>
> 37 U. S. Stats. at Large, 646 (Amend't. XVII).

These resolutions of proposal, and practically all those of adoption of the first seventeen Amendments are conformable to the declarations of Roger Sherman and the First House of Representatives, that the Legislatures in adopting amendments can act only as representatives of the States, and *not* as representatives *of the people*.

But, in the case of the XVIII Amendment the matter ceases to be one of mere conformity with this ancient declaration of the meaning of the V Article, and, by a marked change of the language used by Congress, the amendment was expressly proposed "*to the States*".

The resolution proposing the XVIII Amendment, for the first time, departs from the old form and reads as follows:

> "Resolved by the Senate and House of Representa- "tives of the United States of America in Congress as- "sembled (two thirds of each House concurring therein), "That the following amendment to the Constitution be, "and hereby is proposed to the States, to become valid "as a part of the Constitution when ratified by the legis- "latures of the several States as provided by the Con- "stitution."
>
> (Here follows the text of the XVIII Amendment)
> 40 Stats. at Large, 1050.

The XVIII Amendment was, thus, *in terms*, proposed "to *the States*", and not to the people. It is the only amendment

of which this is true. When the XIX Amendment was proposed Congress returned to the form used in the case of the XVII.

41 U. S. Stats. at Large, 362.

In adopting the XVIII Amendment, the Legislatures were thus expressly invited to act as representatives of *the States*. They could act in no other way than they had been invited to act. Their power to act was limited by and predicated upon the terms of the submission to them.

This situation is emphasized by the rulings in *Hawke* vs. *Smith*, No. 1, 253 U. S. 221, and in *Leser* v. *Garnett*, 258 U. S. 130, which are inconsistent with any theory that the legislatures, in voting on constitutional amendments, are acting as representatives of the people.

Where an amendment is expressly proposed *to the States* for adoption, and the people of a State are not permitted any possible voice or control in the matter of adoption by their legislature, it is a misuse of terms to say that *the people* have adopted the amendment, or that *the people* have, through a legislature over which they are permitted no control, exercised their own reserved power to grant added governing powers over themselves.

In acting on the XVIII Amendment the State legislatures thus could not and did not act on behalf of *the people* of their respective States, nor did they pretend to (except in Michigan), nor were they asked to.

POINT XIII.

No other amendment to the Constitution has involved the question here presented, nor will the validity of any of the other amendments be impaired by an affirmance in this case.

All the amendments to the Constitution have been ratified by legislatures and recourse has never been had to ratification by conventions. This fact is urged by appellant as a practical construction of the provisions of Article 5 of the Constitution.

The contention is to be met as squarely as it is put. Undoubtedly it would be a matter of the most serious consideration if the validity of a number of amendments were involved. *Happily such is not the case.* No amendment save the Eighteenth has ever sought to delegate the National Government any added direct powers over the people or their individual rights.

The court below (R. p. 35) carefully analyzed the nature of the other amendments and clearly pointed out the fundamental difference between the Eighteenth Amendment and the others.

We revert to the classification of constitutional provisions and the sources from which they may be drawn set forth in Point III (pp. 23-25, *supra*). These classes, so far as we are now concerned with them, are:

1. Those provisions which merely affect the framework and machinery of the government, which (except as they involve the creation of an indissoluble nation and the exercise of direct powers over the people) are within the competence of the States in their corporate capacities.

2. Those rights which are exercised by the States in their corporate capacity and the surrender of which may be made by the States as such.

3. Provisions which safeguard the people from usurpation of power and tyranny on the part of the national government and which involve a restriction and not a grant of power over the people, may be adopted by the legislatures.

4. Those provisions which delegate added power to the national government to operate directly upon the people themselves and upon their individual rights and property can be delegated only by the people themselves.

As to the first ten amendments there is of course, no question; none of them seek to confer added powers over the people (*U. S. v. Cruickshank*, 92 U. S. 542). On the contrary they are all restrictions on the National Government. Hence they were adequately adopted by the legislatures. They were, moreover, the direct outcome of protests made by the State conventions and resulted from the promises made to secure ratification, that the Constitution would be immediately amended to add these safeguards.

The Eleventh Amendment is a surrender by the National Government to the States of a part of its judicial power.

The Twelfth Amendment deals only with methods of procedure of the Electoral College—it relates to the mechanics of government.

The Fourteenth Amendment deals variously with the machinery of government and with the surrender by the States of certain of their powers, similar in character to those which had been surrendered in the Articles of Confederation, and in Section 10 of Article 1 of the original Constitution. As to those there can be no question of the competency of the legislatures.

The Fifteenth and Nineteenth Amendments deal not with new governmental powers over the people, but purely with the franchise. At most they present a question of State Rights which the States through the legislatures were competent at all times to surrender.

Political liberty consists in the possession of rights by the citizen which he can compel the government to respect, and

of which he cannot be deprived. The right is a shield from government interference. The franchise is, on the contrary, a power to interfere in the government. One may possess all his personal rights without having the vote. A citizen removes from one State to another. All his *rights* remain. His *franchise* only, has been interrupted.

But to discriminate in the voting power on grounds of color or sex, is to create an inequality—counter to the pervading spirit of our institutions. The removal of the possibility of such a discrimination by the government of any State does not give to the national government an added power over the rights of the people. Waiver of any possible right of the States to make discriminations, on grounds of color or sex, is within the scope of power of the States, as such, and therefore may be approved by the legislatures.

The Seventeenth Amendment was a surrender by each State to the people thereof of the right to elect its representatives in the United States Senate. This right, of course, the legislatures were competent to give back to the people.

We turn now to the Thirteenth and Sixteenth Amendments as to which alone argument is made that they are like in character to the Eighteenth and must stand or fall with it. We cannot understand this insistence because the most cursory analysis in the light of historical fact shows clearly that neither attempted or purported to grant additional direct powers to the United States over the people.

As to the Thirteenth Amendment, the idea that this freed the slaves, so taking away property, lies at the root of the contention. As a matter of historical fact the slaves had been set free in the chief slave states by the Emancipation Proclamation enforced by armies of the United States as a war measure. And, before the submission of the Thirteenth Amendment, every state, save only Delaware and Kentucky had abolished slavery by State constitutional provision. And even in those two States slavery was practically dead; the war had settled it. No one was more definite in his statement that the Thirteenth Amendment was not needed to free

the slaves than the prime author of the Amendment one of the greatest of our Constitutional lawyers, Abraham Lincoln.

As to Kentucky and Delaware, the question is purely academic. In 1891 Kentucky adopted an Anti-Slavery clause in its own Constitution practically identical with the Thirteenth Amendment.

In Delaware there were but 1798 slaves in 1860, and between that year and 1865 most of these had been purchased by the United States government and set free. (5 Rhodes History of the United States, 49 Congressional Globe 1864-1865, p. 242.) Such few slaves as remained had no substantial value as property. In the main they were old men and women, family retainers, whom it was a greater kindness to keep in their old homes than to turn loose on the world. The Governor of Delaware himself asked what was the value of a slave there, who if he but set foot outside the boundary of that tiny commonwealth instantly became free.

Hence the purpose and scope of the Thirteenth Amendment was not a destruction of property rights of individuals. In the great Anti-Slavery debates and in those over the Thirteenth Amendment nothing had been made more clear than that slavery existed anywhere solely by virtue of affirmative legislation of the State. Ownership of slaves was not a natural right, but a creature of affirmative State law. The Thirteenth Amendment was purely a surrender of power of the States to re-establish or maintain the domestic relation of slavery. (2 Curtis Constitutional History, p. 161, Note 15.) Hence it is within our second class of amendments which the States or the legislatures were competent to approve, without reference to the people, because it merely surrendered powers of the States.

As to the Sixteenth (Income Tax) Amendment, the case is also clear. The power of the National Government to levy income taxes had existed from the original adoption of the Constitution.

The question dealt with by the Sixteenth Amendment was simply whether an income tax was thereafter to be considered a "*direct tax*" within the meaning of that term as used in the Constitution, and as such to be apportioned among the several States in proportion to their respective populations.

In case after case definitions of "direct taxes" had previously been given, which would not include income taxes and these had been generally accepted.

> *Hylton* v. *U. S.*, 3 Dall. 171;
> *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 446;
> *Veazie Bank* v. *Fenno*, 8 Wall. 533;
> *Scholey* v. *Rew*, 23 Wall. 331;
> *Springer* v. *U. S.*, 102 U. S. 586.
> See also other authorities cited in the dissenting opinions of Justices Harlan, Brown, Jackson and White, 158 U. S. 638-715.

But the phrase "direct tax" seemed in the course of a century to have attained a new meaning in the view of five of the Justices of the Supreme Court. On the first hearing of the case in 1894, the Court was divided on the question whether an income tax (except on rents) was a "direct tax" within the meaning of the Constitution.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 586.

Upon a rearguument of that case the Court held, five to four, that *any* income tax was a "direct" tax, and had to be so apportioned.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601.

Amendment XVI was passed simply to overcome *that* ruling.

It seems clear that this privilege of apportionment between the States was a matter of *State* privilege, and not a matter

of *individual rights* of citizens of the United States. As such it lay within the power of the States to surrender their special privilege of apportionment.

Strong argument had been made that in the original meaning of the Constitution an income tax was a form of *excise* tax and not a "direct tax", and it may well be urged that the Amendment was passed merely to restore the original construction of the instrument, and, for that reason also, gave no new power to the National Government.

Thus, no other Amendment than the Eighteenth has given occasion to consider this question of *where*, since the adoption of the Tenth Amendment, *has lain the power and authority* to confer *additional powers* on the National Government *over the people or their individual rights*, or presented the question of the reserved "powers" of the people, or of their reservation to them.

POINT XIV.

The question of power now presented has not been argued to or considered by this Court. It has been passed *sub silentio* in all previous cases dealing with the XVIII Amendment. And they do not conclude this question.

There are but three cases where, it might be claimed, that this Court has in any way passed upon the points which we have presented, i. e., the meaning of the Congressional selection and legislative adoption clauses of the V Article, and the purpose and effect of the X Amendment.

These points were not presented to the Court, nor argued before it in any of those cases; and the language of the opinions, though it may appear to be broad enough to cover these points, is in fact directed to wholly different arguments and considerations, and in each case passes these points *sub silentio.*

We take up the three cases mentioned above:

1. *Hawke* vs. *Smith,* (No. 1) 253 U. S. 221.

In this case, the plaintiff sought an injunction to enjoin the Secretary of State of Ohio from proceeding with the submission, by referendum, to the electors of Ohio, of the question of the ratification of the XVIII Amendment.

In its opinion, this Court said:

> "The method of ratification is left to the choice of Con-"gress. Both methods of ratification, by legislatures or "conventions, call for action by deliberative assemblages "representative of the people, which it was assumed "would voice the will of the people.
>
> "The V Article is a grant of authority by the people "to Congress. The determination of the method of rati-"fication is the exercise of the National power specifically

"granted by the Constitution; that power is conferred "upon Congress, and is limited to two methods."

The framers, says the Court, might have adopted a different method, and left ratification to a vote of the people, but the "language of the Article is plain, and admits of no doubt in its interpretation."

This language appears, of course, to be opposed to the propositions which we advance. *But the statement is a mere dictum made by the Court arguendo.*

The *real* issue in that case, the only one argued, and the *only* one which was there *decided*, appears in the opinion itself:

> "The question for our consideration is: whether the "provision of the Ohio Constitution adopted at the gen- "eral election, November, 1918, extending the referen- "dum to the ratification by the General Assembly of pro- "posed amendments to the Federal Constitution, is in "conflict with Article V of the Constitution of the United "States.
>
> "The only question really for determination is:—what "did the framers of the Constitution mean in requiring "ratification by 'legislatures'?"

The decision was that the term "legislatures" in Article V meant the legislative assembly in each State, and did not include a *referendum* to the vote of the people.

In no respect was there presented to the court any claim, contention or argument that the discretion of Congress, to select legislatures or conventions as the agencies of ratification, or the power of legislatures to adopt amendments, was limited either by the Fifth Article as we contend it should be construed, or by the provisions of the X Amendment. Neither of these questions is even hinted at in the opinion. The X Amendment is not even mentioned and the case is, at the utmost, a construction of Article V as originally adopted, and without noticing that its provisions had been clarified and taken without any reference to the contention which we urge that such article is controlled by the X Amendment.

2. *National Prohibition Cases*, 253 U. S. 350.

In these cases, the Court did not hand down an ordinary opinion, but merely certain conclusions.

Of these but one has any bearing here.

The Court said:

> "That amendment by lawful proposal and ratification "has become a part of the Constitution, and must be re- "spected and given effect the same as other provisions of "that instrument".

The vital changes in the X Amendment and their effect on its meaning seem to have passed unnoticed by anyone in the *National Prohibition Cases*. No one made any point of the reservation "to the people". All wholly failed to notice the corrections of Carroll and of Roger Sherman. They failed to observe that the first Nine Amendments dealt with *rights*, and the X exclusively with *"powers"*, and expressly with the *powers "not delegated to the United States"*. Nor did they apparently advance the controlling force of the general intent as affecting the provisions of Article V.

3. *Dillon* vs. *Gloss*, 256 U. S. 368.

In this case the only language at all applicable is the statement in the opinion (p. 374) that it is

> "a condition to amending that instrument that the "amendment be submitted to representative assemblies "in the several states and be ratified in three-fourths of "them. The plain meaning of this is that (a) all amend- "ments must have the sanction of the people of the "United States, the original fountain of power, acting "through representative assemblies, and (b) that rati- "fication by these assemblies in three-fourths of the states "shall be taken as a decisive expression of the people's "will and be binding on all."

The statement is but a dictum since the sole issue was whether or not the seven-year clause in the proposed Amendment was valid. This question is not touched in the above phrases.

That opinion declares that all amendments must have the sanction of the people of the United States, the original fountain of power. It suggested, however, that the sanction of the people may be obtained either through legislatures or conventions. In making this suggestion, which was but a dictum, the court obviously overlooked the whole political philisophy of the period of adoption, expressed in debates on and in the passage of the resolution for ratification by conventions and not legislatures, the House resolution governing the form of the first ten amendments, the debates in the state conventions and the clear declarations, as in *McCulloch* vs. *Maryland*, that the legislatures did not represent the people for any such purpose, and that the *only* manner in which the people could act on such a subject was by assembling in conventions in their several states.

The dictum, in *Dillon* v. *Glass*, cutting both ways seems wholly inconclusive.

Counsel for the appellant have suggested certain clauses in various papers in the National Prohibition cases as raising the questions we raise.

Even taken by themselves apart from their context they fail to do so.

Counsel for appellant conceds that these questions were not raised in either *Hawke* v. *Smith* or in *Dillon* v. *Glass*. They place their contentions on the briefs in the *National Prohibition Cases*, *Rhode Island* v. *Palmer*, No. 29 Original, and the bill of complaint in *New Jersey* v. *Palmer*, No. 30 Original.

These are suits by *States*, asserting *State Rights*.

We stand not on State Rights, but on the rights and powers of *"the People."* So we start from a fundamentally different standpoint and are contending for a fundamentally different thing.

The contention of the complainant on the motion to dismiss in *Rhode Island* v. *Palmer*, quoted by appellant, was that the legislature of a State cannot relinquish *the State's sovereign powers*.

Our contention is that neither States nor legislatures can grant away the powers *"reserved to the people"*.

The passage quoted from the brief of Mr. Root, on pages 19-20 of the appellant's brief points out that the adoption by legislatures gives no opportunity to express the will of the people, and that the legislatures acted "solely in the alleged "exercise of the agency or authority granted the State legisla- "tures by Article V of the Constitution more than a century "ago. In some States the action of the State legislature was "in express violation of the commands of the people of the "State".

We find in this no suggestion of the considerations that we are urging.

The brief of Messrs. Lincoln and Lynch is founded on the principle that an amendment granting new and additional powers is not an "amendment", within the true meaning of that word.

They, too, make no suggestion of the contentions we advance.

The allegations of the bill in *New Jersey* v. *Palmer* (appellant's brief, pp. 21-22) do say that the proposal was submitted in the manner provided in Article V "in the alleged exercise of a special power conferred by that article contrary to the true intent and meaning thereof."

It does not appear that they meant by this allegation anything more than the contention that the grant of an added power was not an "amendment" but an infringement of States rights. The rulings of this Court in the *National Prohibition Cases* would seem to indicate that this was the meaning which this Court attached to that allegation; and it is all that counsel in the case seemed to attach to it.

Nor can we believe that this Court consciously passed on the question what powers were "reserved to the people" by the X. Amendment, without some expression concerning the most fundamental question of constitutional law that has been presented since *Marbury* v. *Madison*, or reversed with-

out a word of remark the uniform rulings of the Court from *Chisolm* vs. *Georgia* in 1792, to *Kansas* vs. *Colorado* in 1906.

The more one studies the briefs in those cases and compares them with what we submit, the clearer it becomes that the contentions we advance were not advanced there.

The supreme point of the ultimate sovereign power and its deliberate reservation "to the people" was passed *sub silento* by both court and counsel. This Court, when the question is finally raised and argued does not consider itself bound by such a decision.

United States v. *Moor*, 3 Cranch. 159;
Cross v. *Burke*, 146 U. S. 86-87;
United States v. *Sanges*, 144 U. S. 310, 319.

Related Miscellaneous Contentions of Appellant.

The appellant's quotation from Elbridge Gerry lacks weight when one remembers that he, alone of the New England delegates to the Constitutional Convention of 1787, refused to sign it. He throughout misunderstood its purport and its terms.

That from Hamilton (Federalist Cap. 85) is from an article dealing with further restrictions on the government's powers; his views on the subject of conferring additional powers on the government over the people and their rights he had given in Cap. 84 of the Federalist, quoted above on page 41.

Hamilton, thus, in these two articles of the Federalist was drawing the same distinction that we draw between amendments conferring added powers over the people, which they alone could adopt, and amendments of other descriptions which legislatures could adopt.

Of certain other historical contentions made by the appellant we may speak briefly.

Vermont was not one of the original Thirteen. And it is moreover not correct to say that the legislature adopted the Vermont Constitution. There was no legislature till there

was a Constitution. The body which appellant refers to was like the English Grand Convention of 1688, which was not a Parliament, nor ever recognized as such, and which declared the throne vacant, making the English Revolution.

Similarly the bodies in Virginia and South Carolina which adopted their Constitutions were not legislatures, nor did they exercise the power of legislatures in so doing. They claimed to be, and time showed the correctness of that claim, the representatives of the people acting as a Congress or Convention of the people exercising powers never possessed by the Colonial Legislatures.

The resolutions of the National Constitutional Convention of 1787, the declarations of Marshall in *McCulloch* vs. *Maryland*, and the other supreme authorities cited in Point II answer these suggestions of appellant conclusively.

In *Pollock* v. *Farmers' Loan & Trust Company*, 157 U. S. 429, Chief Justice Fuller wrote, pronouncing the opinion of the Court:

> "We proceed then to examine certain decisions of this "court under the acts of 1861 and following years, in "which it is claimed that this court has heretofore ad- "judicated that taxes like those under consideration are "not direct taxes and subject to the rule of apportion- "ment, and that we are bound to accept the rulings thus "asserted to have been made as conclusive in the prem- "ises. Is this contention well founded as respects the "question now under examination? Doubtless the doc- "trine of *stare decisis* is a salutary one, and to be ad- "hered to on all proper occasions, *but it only arises in "respect of decisions directly upon the points in issue.*"

Justice Fuller then discussed the decisions in *Cohens* v. *Virginia*, 6 Wheat. 264, in *Carroll* v. *Lessee of Carroll*, 16 How. 275, in *The Genesee Chief*, 12 How. 443, and *Orleans* v. *Phoebus*, 11 Pet. 175, dealing with this question, and concluded:

> "Manifestly, as this court is clothed with the power, "and entrusted with the duty, to maintain the funda-

"mental law of the Constitution, the discharge of that "duty requires it not to extend any decision upon a con- "stitutional question if it is convinced that error in prin- "ciple might supervene."

It is what the court has investigated with care and considered in its fullest extent. It is the precise question to which there has been an application of the judicial mind. It is a decision made when the great importance of the question presented is seen and the subject has received that deliberate consideration to which it was entitled. These are the features that lie back of the doctrine of *stare decisis.*

For this, we have the opinions, quoted by Chief Justice Fuller, of Marshall, of Curtis and of Taney, and the opinion of Chief Justice Fuller himself.

In the following cases in this Court has held that it does not feel itself found by its prior formal decisions where a question though adjudicated has in fact been passed on only *sub silentio.*

United States vs. *More,* 3 Cranch 159;
United States vs. *Sanges,* 144 U. S. 310, 319;
Cross vs. *Burke,* 146 U. S. 82.

POINT XV.

Of the Opinion of the Court Below.

We are deeply indebted to the Trial Judge for the learning and scholarship shown in his opinion, and we have borrowed freely from the authorities to which he refers.

We think, however, that in certain particulars he misapprehended the argument presented, and we call attention to this fact lest we again be misunderstood. Apparently the learned court supposed that we conceded the literal interpretation of the Fifth Article of the Constitution and that considering that article alone, Congress had the absolute option to select legislatures or conventions as the agents of ratification for amendments. He said, for example:

> "Any express limitation of the language of article 5 "must be sought in some reservation. The only de- "feasance in the grant of the Constitution is found in the "tenth amendment. Counsel have placed the two provi- "sions in combination and have argued that the result "justifies their thesis that any amendment granting gov- "ernmental powers over the people to the United States "must be submitted to conventions, instead of to State "legislatures" (R. p. 17).

After holding that neither legislatures nor conventions could be deemed the only authorized representatives of the people, he proceeded:

> "We must reject, therefore, counsel's argument, based "on their combination and subsequent interpretation of "article 5 and the 10th amendment. We give, however, "full weight to their development of the tacit assump- "tions drawn from both the historical and theoretical "nature of our Federal system, although our development "thereof does not altogether parallel that of their briefs" (R. p. 21).

Our argument to the Trial Judge in fact involved the same sequence that we now present. We asserted that the history of Article 5 and of the conventions and debates showed that

by itself Article V was never intended to confer this arbitrary option upon Congress. Then we argued that this view was confirmed by the Constitution as a whole and particularly by the language of the Tenth Amendment; and that had there been any doubt as to its meaning, the Tenth Amendment clarified and, if necessary, superseded the provisions of Article V. The learned Judge, from the quotations given, appears to have recognized only the third part of that argument, but in reaching his decision it is most striking that he should have come to the same conclusion as we did as to the meaning of Article V, though by a different route. He departed from what he called the "stereotyped" method of construction, whereas we proceeded along that line, construing the language of the article in the light of the dominant purpose and intent as shown by the debates, the surrounding circumstances, and political philosophy which animated the Constitution as a whole and which was expressly declared in the Preamble. Every authority referred to by the learned Judge makes stronger our own interpretation.

The government refers in its brief (pp. 8-9) more or less slightingly to paragraphs in the opinion of the court below in which the court refers to policital science and scientific approach to the problems of government. This court has frequently made reference to Montesquieu and Lecky and other writers with whom the framers of the Constitution were more familiar than most lawyers of today. And this court has never hesitated to appeal for aid to political science or philosophy in arriving at its determinations. The scholarly Judge below has shown remarkable familiarity with the writers on the subject. But the framers of the Constitution were familiar with this philosophy; in fact it was the dominating influence in the making of the Constitution. The words they used are, therefore, to be interpreted in the light of the learning and philosophy which actuated their judgment. It forms an ineradicable part of Constitutional history of our country. It is a true index to an understanding of the Constitution itself and may properly be used in any lawyer-like presenta-

tion of the subject. It makes no difference whether the method be called "stereotyped" or "scientific". It is in either case a fitting method of approach to great questions of Constitutional interpretation (see argument of Jeremiah Black in *Ex Parte* Milligan—American Trials, *Ex Parte*: In the Matter of Lambdon P. Milligan, edited by Samuel Klaus).

The wisdom and soundness of our construction of Article V, which we assert is compelled by the sheer force of what the framers and adopters thought *and said*, stands up under the test of modern thinking in the field of political science. This is the thesis of the opinion below. That this thinking maintains its pristine strength under the sharp criticism of modern thought is but additional tribute to the vision of the founders of the Constitution. To seek the summation of this modern thought, it is unnecessary to go beyond the bounds of the opinion of the court below.

In one respect, however, we dissent from the declaration of the lower court. This is summarized in the language of the opinion:

> "We can not, however, follow the argument that a con-
> "vention is more within the definition of the people than
> "a State legislature. * * *
>
> "At any rate, both the convention, the special agent,
> "and the legislature, the general agent, are clearly but
> "different manifestations of the machinery of represen-
> "tation required by the inconvenience of direct action.
> "* * *
>
> "We have never before heard it contended that either
> "one or the other is 'the people'. It would be most extra-
> "ordinary, therefore, to argue that one shou'd and the
> "other should not be so classified" (R. pp. 19-20).

We deem it well established and beyond controversy that in the minds of those who framed and adopted the Constitution this precise distinction existed, and that so far as ratification and amendments of the Constitution is concerned, conventions *are* the people, and legislatures are not, but are representative of the states. Authority for this view has been set forth at length in Points IV and XI.

POINT XVI.

The contentions we present are of fundamental constitutional importance. The Eighteenth Amendment is merely the incident that presents the basic question of the control of the liberties of the people, and the powers expressly reserved, to them by the Tenth Amendment.

CONCLUSION.

As the Eighteenth Amendment has never been adopted by the people, to whom alone was reserved the power to grant any such additional powers over themselves or their rights to the National Government, Congress had no power to enact or enforce the statutory provisions under which this indictment is framed. The provisions of the act on which the indictment is predicated are therefore unconstitutional. Consequently no crime against the United States is charged by the indictment.

The judgment quashing the indictment must, therefore, be affirmed.

The X Amendment, as pointed out by Justice Brewer in *Turner* v. *Williams*, 194 U. S. 279, 295-296, has received too little attention. The framers of that amendment, as he said in *Kansas* v. *Colorado*, intended "that if in the future further powers seemed necessary, they should be "*granted by the* "*people* in the manner they had provided for amending that act," and he added:

> "The powers not delegated to the United States by the "Constitution, nor prohibited by it to the States, are "reserved to the States respectively, or to the people. "The argument of counsel ignores the principal factor in "this article, to wit, 'the people'. Its principal purpose

"was not the distribution of power between the United "States and the States, but a reservation to the people "of all powers not granted. * * * And all powers of a "national character which are not delegated to the "National Government by the Constitution are reserved "to the people of the United States."

Kansas v. *Colorado*, 206 U. S. 46, 89-90.

The question is, is this to be a government *by the people*, or a government by legislators despite the people? On that point no higher statement can be made than that of Abraham Lincoln at Gettysburg, and his plea:

"That we here highly resolve that these dead shall not "have died in vain, that this Nation, under God, shall "have a new birth of freedom and that Government of "the people, by the people, for the people, shall not perish "from the earth."

To declare this free government of the people, by the people, for the people, to be within the unlimited control of an unrestrainable oligarchy, with absolute despotic power to change its every feature vested in the hands of a few men—is Revolution.

In the words of Marshall:

"The people made the Constitution, and the people "can unmake it. It is the creature of their will, and "lives only by their will. But this supreme and "irresistible power to make or unmake, resides only in "the whole body of the people; not in any subdivision "of them. The attempt of any of the parts to exercise "it is usurpation, and ought to be repelled by those to "whom the people have delegated their power of re-"pelling it."

Cohens vs. *Virginia*, 6 Wheat. 264, 389.

In a government of the people, by the people, for the people, additional grants of power can spring only from the people.

Such was the law as declared by this Court from *Chisolm* vs. *Georgia*, in 1792, to *Kansas* vs. *Colorado*, in 1906.

This was a great free nation, where the sovereignty resided in the people alone. Is it henceforth to be controllable by an oligarchy possessed of absolute and despotic power, and the reservation of powers to the people in the Constitution to be held meaningless?

That is the issue here presented.

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APPENDIX A.

Amendments to the Constitution.

ARTICLE XIII.

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XVI.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

ARTICLE XIX.

"The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation."

APPENDIX B.

Excerpts from Elliot's Debates on the Federal Constitution, Vol. V.

Pp. 126-132—Tuesday, May 29, 1787.

Mr. RANDOLPH then opened the main business:

* * * * * * *

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissentions between members of the Union, or seditions in particular states; thirdly, to procure to the several states various blessings, of which an isolated situation was incapable; fourthly, it should be able to defend itself against encroachment; and fifthly, to be paramount to the state constitutions.

* * * * * * *

He then proceeded to enumerate the defects:

* * * * * * *

Thirdly, that there were many advantages which the United States might acquire, which were not attainable under the Confederation; such as productive imposts, counteraction of the commercial regulations of other nations, pushing of commerce ad libitum, &c., &c.

Fourthly, that the federal government could not defend itself against encroachments from the states.

Fifthly, that it was not even paramount to the state constitutions, ratified as it was in many of the states.

* * * * * * *

He proposed, as conformable to his ideas, the following resolutions, which he explained one by one.

"1. Resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty, and general welfare.'"

* * * * * * *

"13. Resolved, that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto.

* * * * * * *

"15. Resolved, that the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon."

* * * * * * *

Mr. CHARLES PINCKNEY laid before the House the draft of a federal government which he had prepared, to be agreed upon between the free and independent States of America:

* * * * * * *

"ART. XVI. If two thirds of the legislatures of the states apply for the same, the legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two thirds of each House, propose to the states amendments to the same, the agreement of two thirds of the legislatures of the states shall be sufficient to make the said amendments parts of the Constitution."

Pp. 157-158—Tuesday, June 5, 1787.

The thirteenth resolution, to the effect *that provision ought to be made for hereafter amending the system now to be established, without requiring the assent of the national legislature*, being taken up.

Mr. PINCKNEY doubted the propriety or necessity of it.

Mr. GERRY favored it. The novelty and difficulty of the experiment requires periodical revision. The prospect of such a revision would also give intermediate stability to the government. Nothing had yet happened in the state where this provision existed to prove its impropriety. The proposition was postponed for further consideration, the votes being,—

Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, North Carolina, ay 7; Virginia, South Carolina, Georgia, no, 3.

* * * * * * *

The fifteenth resolution, *for recommending conventions under appointment of the people, to ratify the new Constitution, &c.* being taken up,

Mr. SHERMAN thought such a popular ratification unnecessary; the Articles of Confederation providing for changes and alterations, with the assent of Congress, and ratification of state legislatures.

Mr. MADISON thought this provision essential. The Articles of Confederation themselves were defective in this respect, resting, in many of the states, on the legislative sanction only. Hence, in conflicts between acts of the states and of Congress, especially where the former are of posterior date, and the decision is to be made by state tribunals, an uncertainty must necessarily prevail; or rather, perhaps, a certain decision in favor of the state authority. He suggested also that, as far as the Articles of Union were to be considered as a treaty only, of a particular sort, among the governments of independent states, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from the whole obligation. For these reasons, as well as others, he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves.

MR. GERRY observed, that in the Eastern States the Confederation had been sanctioned by the people themselves. He seemed afraid of referring the new system to them. The people in that quarter have at this time the wildest ideas of government in the world. They were for abolishing the Senate in Massachusetts, and giving all the other powers of government to the other branch of the legislature.

MR. KING supposed, that the last article of the Confederation rendered the legislature competent to the ratification. The people of the Southern States, where the Federal Articles

had been ratified by the legislatures, only, had since, *impliedly*, given their sanction to it. He thought, notwithstanding, that there might be policy in varying the mode. A convention being a single House, the adoption may more easily be carried through it, than through the legislatures, where there are several branches. The legislatures, also, being to lose power, will be most likely to raise objections. The people having already parted with the necessary powers, it is immaterial to them by which government they are possessed, provided they be well employed.

Mr. WILSON, took this occasion to lead the committee, by a train of observation, to the idea of not suffering a disposition, in the plurality of states, to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few states. He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest.

Mr. PINCKNEY hoped that, in case the experiment should not unanimously take place, nine states might be authorized to unite under the same government.

The fifteenth resolution was postponed, *nem con.*

Pp. 182-183—Monday, June 11, 1787.

The thirteenth resolution, for amending the national Constitution, hereafter, without consent of the national legislature, being considered, several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary.

Col. MASON urged the necessity of such a provision. The plan now to be formed will certainly be defective, as the Confederation has been found on trial to be. Amendments, therefore, will be necessary; and it will be better to provide for them in an easy, regular, and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the national legislature, because they may abuse their power, and refuse their assent on that very account. The opportunity for such an abuse may be the fault of the Constitution calling for amendment.

Mr. RANDOLPH enforced these arguments.

The words "without requiring the consent of the national legislature" were postponed. The other provision in the clause passed, *nem con.*

* * * * * * *

P. 183—Tuesday, June 12, 1787.

In Committee of the Whole.—The question was taken on the fifteenth resolution, to wit, referring the new system to the people of the United States for ratification. It passed in the affirmative.

> Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia, ay, 6; Connecticut, New York, New Jersey, no, 3; Delaware, Maryland, divided. (Pennsylvania omitted in the printed Journal. The vote is there entered as of June 11.)

Pp. 189-190—Wednesday, June 13, 1787.

The committee rose, and Mr. GORHAM made report, which was postponed till tomorrow, to give an opportunity for other plans to be proposed: the report was in the words following:—

* * * * * * *

> 17. Resolved, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.
>
> * * * * * * *
>
> 19. Resolved, That the amendments which shall be offered to the Confederation by the Convention, ought, at a proper time or times after the approbation of Congress, to be submitted to an assembly or assemblies recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

P. 195—Saturday, June 16, 1787.

Mr. WILSON entered into a contract of the principal points of the two plans, so far, he said, as there had been time to examine the one last proposed. These points were,—1. In the Virginia plan * * *

13. Finally, the ratification is, in this, to be by the people themselves; in that, by the legislative authorities, according to the thirteenth Article of the Confederation.

Hamilton, p. 199—Monday, June 18, 1787.

"It may be said, that the *states* cannot ratify a plan not within the purview of the Articles of the Confederation providing for alterations and amendments.

But may not the states themselves, in which no constitutional authority equal to this purpose exists in the legislatures, have had in view a reference to the people at large?"

Pp. 352-356—Monday, July 23, 1787.

The nineteenth resolution, referring the new Constitution to assemblies to be chosen by the people, for the express purpose of ratifying it, was next taken into consideration.

Mr. ELLSWORTH moved that it be referred to the legislatures of the states for ratification. Mr. PATTERSON seconded the motion.

Col. MASON considered a reference of the plan to the authority of the people as one of the most important and essential of the resolutions. The legislatures have no power to ratify it. They are the mere creatures of the state constitutions, and cannot be greater than their creators. And he knew of no power in any of the constitutions—he knew there was no power in some of them—that could be competent to this object. Whither, then, must we resort? To the people, with whom all power remains that has not been given up in the constitutions derived from them? It was of great moment, he observed, that this doctrine should be cherished as the basis of free government. Another strong reason was, that, admitting the legislatures to have competent authority, it would be wrong to refer the plan to them, because succeeding legislatures, having equal authority, could undo the acts of their predecessors; and the national government would stand, in each state, on the weak and tottering foundation

of an act of assembly. There was a remaining consideration of some weight. In some of the states the governments were not derived from the clear and undisputed authority of the people. This was the case in Virginia. Some of the best and wisest citizens considered the constitution as established by an assumed authority. A national constitution derived from such a source would be exposed to the severest criticisms.

Mr. RANDOLPH: One idea has pervaded all our proceedings, to wit, that opposition as well from the states as from individuals will be made to the system to be proposed. Will it not then be highly imprudent to furnish any unnecessary pretext by the mode of ratifying it? Added to other objections against a ratification by the legislative authority only, it may be remarked, that there have been instances in which the authority of the common law has been set up in particular states against that of the Confederation, which has had no higher sanction than legislative ratification. Whose opposition will be most likely to be excited against the system? That of the local demagogues who will be degraded by it from the importance they now hold. These will spare no efforts to impede that progress in the popular mind which will be necessary for the adoption of the plan, and which every member will find to have taken place in his own, if he will compare his present opinions with those he brought with him into the Convention. It is of great importance, therefore, that the consideration of this subject should be transferred from the legislatures, where this class of men have their full influence, to a field in which their efforts can be less mischievous. It is moreover worthy of consideration, that some of the states are averse to any change in their constitution, and will not take the requisite steps, unless expressly called upon, to refer the question to the people.

Mr. GERRY: The arguments of Col. Mason and Mr. Randolph prove too much. They prove an unconstitutionality in the present federal system, and even in some of the state

governments. Inferences drawn from such a source must be inadmissible. Both the state governments and the federal government have been too long acquiesced in to be now shaken. He considered the Confederation to be paramount to any state constitution. The last article of it, authorizing alterations, must consequently be so as well as the others: and everything done in pursuance of the article must have the same high authority with the article. Great confusion, he was confident, would result from a recurrence to the people. They would never agree on anything. He could not see any ground to suppose that the people will do what their rulers will not. The rulers will either conform to or influence the sense of the people.

Mr. GORHAM was against referring the plan to the legislatures. 1. Men chosen by the people for the particular purpose will discuss the subject more candidly than members of the legislature, who are to lose the power which is to be given up to the general government. 2. Some of the legislatures are composed of several branches. It will consequently be more difficult, in these cases, to get the plan through the legislatures than through a convention. 3. In the states many of the ablest men are excluded from the legislatures, but may be elected to a convention. Among those may be ranked many of the clergy, who are generally friends to good government. Their services were found to be valuable in the formation and establishment of the constitution of Massachusetts. 4. The legislatures will be interrupted with a variety of little business; by artfully pressing which designing men will find means to delay from year to year, if not to frustrate altogether, the national system. 5. If the last article of the Confederation is to be pursued, the unanimous concurrence of the states will be necessary. But will anyone say that all the states are to suffer themselves to be ruined if Rhode Island should persist in her opposition to general measures? Some other states might also tread in her steps. The present advantage, which New York seems to be so much attached to, of taxing her neighbors by

the regulation of her trade, makes it very probable that she will be of the number. It would, therefore, deserve serious consideration whether provision ought not to be made for giving effect to the system without waiting for the unanimous concurrence of the states.

Mr. Ellsworth: If there be any legislatures who should find themselves incompetent to the ratification, he should be content to let them advise with their constituents, and pursue such a mode as would be competent. He thought more was to be expected from the legislatures than from the people. The prevailing wish of the people in Eastern States is, to get rid of the public debt; and the idea of strengthening the national government carries with it that of strengthening the public debt. It was said by Col. Mason, in the first place, that the legislatures have no authority in this case; and in the second, that their successors, having equal authority, could rescind their acts. As to the second point, he could not admit it to be well founded. An act to which the states, by their legislatures, make themselves parties, becomes a compact from which no one of the parties can recede of itself. As to the first point, he observed that a new set of ideas seemed to have crept in since the Articles of Confederation were established. Conventions of the people, or with power derived expressly from the people, were not then thought of. The legislatures were considered as competent. Their ratification has been acquiesced in without complaint. To whom have Congress applied on subsequent occasions for further powers? To the legislatures, not to the people. The fact is, that we exist at present, and we need not inquire how, as a federal society, united by a charter, one article of which is, that alterations therein may be made by the legislative authority of the states. It has been said, that, if the Confederation is to be observed, the states must *unanimously* concur in the proposed innovations. He would answer, that, if such were the urgency and necessity of our situation as to warrant a new compact among a part of the states, founded on the consent of the people, the same pleas

would be equally valid in favor of a partial compact, founded on the consent of the legislatures.

Mr. WILLIAMSON thought the resolution (the nineteenth) so expressed as that it might be submitted either to the legislatures or to conventions recommended by the legislatures. He observed that some legislatures were evidently unauthorized to ratify the system. He thought, too, that conventions were to be preferred, as more likely to be composed of the ablest men in the states.

Mr. GOUVERNEUR MORRIS considered the inference of Mr. Ellsworth from the plea of necessity, as applied to the establishment of a new system on the consent of the people of a part of the states, in favor of a like establishment on the consent of a part of the legislatures, as a *non sequitur*. If the Confederation is to be pursued, no alteration can be made without the unanimous consent of the legislatures. Legislative alterations not conformable to the federal compact would clearly not be valid. The judges would consider them as null and void. Whereas, in case of an appeal to the people of the United States, the supreme authority, the federal compact may be altered by a *majority of them*, in like manner as the constitution of a particular state may be altered by a majority of the people of the state. The amendment moved by Mr. Ellsworth erroneously supposes that we are proceeding on the basis of the Confederation. This Convention is unknown to the Confederation.

Mr. KING thought with Mr. Ellsworth that the legislatures had a competent authority, the acquiescence of the people of America in the Confederation being equivalent to a formal ratification by the people. He thought with Mr. Ellsworth, also, that the plea of necessity was as valid in the one case as the other. At the same time, he preferred a reference to the authority of the people, expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new Constitution, as well as the most likely means of drawing forth the best men in the states to decide on it. He remarked, that,

among other objections made in the state of New York to granting powers to Congress, one had been, that such powers as would operate within the states could not be reconciled to the Constitution, and therefore were not grantable by the legislative authority. He considered it as of some consequence, also, to get rid of the scruples which some members of the state legislatures might derive from their oaths to support and maintain the existing constitutions.

Mr. MADISON thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and it would be a novel and dangerous doctrine that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty* and a *constitution*. The former, in point of *moral obligation*, might be as inviolable as the latter. In point of *political operation* there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation. Comparing the two modes, in point of expediency, he thought all the considerations which recommended this Convention, in preference to Congress, for proposing the reform, were in

favor of state conventions, in preference to the legislatures, for examining and adopting it.

On the question on Mr. Ellsworth's motion to refer the plan to the legislatures of the states:

> Connecticut, Delaware, Maryland—aye, 3; New Hampshire, Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, Georgia—no, 7.

Mr. GOUVERNEUR MORRIS moved that the reference of the plan be made to one general convention, chosen and authorized by the people, to consider, *amend* and establish the same. Not seconded.

On the question for agreeing to the nineteenth resolution, touching the mode of ratification as reported from the committee of the whole, viz., to refer the Constitution, after the approbation of Congress, to assemblies chosen by the people:

> New Hampshire, Massachusetts, Connecticut, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia—aye, 9; Delaware—no, 1 (pp. 352-356).

Pp. 374-376—Thursday, July 26, 1787.

The proceedings since Monday last were unanimously referred to the committee of detail; and the Convention then unanimously adjourned till Monday, August 6th, that the committee of detail might have time to prepare and report the Constitution. The whole resolutions, as referred, are as follows:

> "19. *Resolved*, That provisions ought to be made for the Amendment of the Articles of Union, whensoever it shall seem necessary."

> "21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies, of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon" (p. 378).

Pp. 376-381—Monday, Aug. 6, 1787.

In Convention.—Mr. John Francis Mercer, from Maryland, took his seat.

Mr. RUTLEDGE delivered in the report of the committee of detail, as follows—a printed copy being at the same time furnished to each member:

"We, the people of the states of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare and establish the following Constitution for the government of ourselves and our posterity:" (pp. 376-377).

"Art. XIX.—On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose" (p. 381).

"Art. XXI.—The ratification of the conventions of • • • states shall be sufficient for organizing this Constitution" (p. 381).

"Art. XXII.—This Constitution shall be laid before the United States in Congress assembled, for their approbation, and it is the opinion of this Convention, that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention" (p. 381).

"Art. XXIII.—To introduce this government, it is the opinion of this Convention that each assenting convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the conventions of • • • states, should appoint and publish a day, as early as may be, and appoint a place of commencing proceedings under this Constitution; that after such publication the legislatures of the several states should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the legislature should meet at the time and

place assigned by Congress, and should as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution."

P. 498—Thursday, Aug. 30, 1787.

Article 19 was then taken up.

Mr. GOUVERNEUR MORRIS suggested that the legislature should be left at liberty to call a convention whenever they pleased.

The article was agreed to *nem. con.* (p. 498).

Article 21 being then taken up:

"The ratifications of the conventions of * * * states shall be sufficient for organizing this Constitution; * * *."

Pp. 499-502—Friday, August 31, 1787.

Mr. GOUVERNEUR MORRIS moved to strike out "conventions of the" after "ratifications;" leaving the states to pursue their own modes of ratification.

Mr. CARROLL mentioned the mode of altering the constitution of Maryland pointed out therein, and, that no other mode could be pursued in that state.

Mr. KING thought that striking out "conventions" as the requisite mode was equivalent to giving up the business altogether. Conventions alone, which will avoid all the obstacles from the complicated formation of the legislatures, will succeed; and if not positively required by the plan, its enemies will oppose that mode.

Mr. GOUVERNEUR MORRIS said he meant to facilitate the adoption of the plan by leaving the modes approved by the several state constitutions to be followed.

Mr. MADISON considered it best to require conventions among other reasons for this, that the powers given to the general government, being taken from the state governments, the legislatures would be more disinclined than conventions

composed in part, at least, of other men; and if disinclined, they could devise modes apparently promoting, but really thwarting the ratification. The difficulty in Maryland was no greater than in other states, where no mode of change was pointed out by the constitution, and all officers were under oath to support it. The people were, in fact, the fountain of all power, and by restoring to them all difficulties were gotten over. They could alter constitutions as they pleased. It was a principle in the bills of rights that first principles might be resorted to.

Mr. M'HENRY said that the officers of government in Maryland were under oath to support the mode of alteration prescribed by the constitution.

Mr. GORHAM urged the expediency of "conventions," also Mr. PINCKNEY, for reasons formerly urged on a discussion of this question.

Mr. L. MARTIN insisted on a reference to the state legislatures. He urged the danger of commitions from a resort to the people and to first principles; in which the government might be on one side and the people on the other. He was apprehensive of no such consequences, however, in Maryland, whether the legislature or the people should be appealed to. Both of them would be generally against the constitution. He repeated also the peculiarity in the Maryland constitution.

Mr. KING observed that the constitution of Massachusetts was made unalterable till the year 1790; yet this was no difficulty with him. The state must have contemplated a recurrence to first principles before they sent deputies to this Convention.

Mr. SHERMAN moved to postpone Article 21 and to take up Article 22; on which question—

> Connecticut, Pennsylvania, Delaware, Maryland, Virginia—ay, 5; New Hampshire, Massachusetts, New Jersey, North Carolina, South Carolina, Georgia—no, 6.

On Mr. Gouverneur Morris's motion to strike out "conventions of the," it was negatived.

Connecticut, Pennsylvania, Maryland, Georgia—ay, 4; New Hampshire, Massachusetts, New Jersey, Delaware, Virginia, South Carolina—no, 6 (pp. 493-500).

* * * * * * * *

Article 22 was then taken up, to wit:

"This Constitution shall be laid before the United States, in Congress assembled, for their approbation: and it is the opinion of this Convention that it should be afterwards submitted to a convention chosen in each state, under the recommendation of its legislature, in order to receive the ratification of such convention."

Mr. GOUVERNEUR MORRIS and Mr. PINCKNEY moved to strike out the words "for their approbation."

On this question—

New Hampshire, Connecticut, New Jersey (in the printed Journal, New Jersey, no), Pennsylvania, Delaware, Virginia, North Carolina, South Carolina—ay, 8; Massachusetts, Maryland, Georgia—no, 3.

Mr. GOUVERNEUR MORRIS and Mr. PINCKNEY then moved to amend the article so as to read:

"This Constitution shall be laid before the United States, in Congress assembled; and it is the opinion of this Convention that it should afterwards be submitted to a convention chosen in each state, in order to receive the ratification of such convention; to which end the several legislatures ought to provide for the calling conventions within their respective states as speedily as circumstances will permit."

Mr. GOUVERNEUR MORRIS said his object was to impress in stronger terms the necessity of calling conventions, in order to prevent enemies to the plan from giving it the go-by. When it first appears, with the sanction of this Convention, the people will be favorable to it. By degrees the state officers, and those interested in the state governments, will intrigue, and turn the popular current against it.

Mr. L. MARTIN believed Mr. Morris to be right, that, after a while, the people would be against it, but for a different reason from that alleged. He believed they would not ratify it unless hurried into it by surprise.

Mr. GERRY enlarged on the idea of Mr. L. Martin, in which he concurred; represented the system as full of vices, and dwelt on the impropriety of destroying the existing Confederation, without the unanimous consent of the parties to it.

On the question on Mr. Gouverner Morris's and Mr. Pinckney's motion:

> New Hampshire, Massachusetts, Pennsylvania, Delaware—ay, 4; Connecticut, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 7.

Mr. GERRY moved to postpone Article 22.

Col. MASON seconded the motion, declaring that he would sooner chop off his right hand than put it to the Constitution as it now stands. He wished to see some points, not yet decided, brought to a decision, before being compelled to give a final opinion on this article. Should these points be improperly settled, his wish would then be to bring the whole subject before another General Convention.

Mr. GOUVERNEUR MORRIS was ready for a postponement. He had long wished for another Convention that will have the firmness to provide a vigorous government which we are afraid to do.

Mr. RANDOLPH stated his idea to be, in case the final form of the Constitution should not permit him to accede to it, that the state conventions should be at liberty to propose amendments, to be submitted to another General Convention, which may reject or incorporate them as may be judged proper.

On the question for postponing:

> New Jersey, Maryland, North Carolina—ay, 3; New Hampshire, Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, South Carolina, Georgia—no, 8 (pp. 501-502).

Pp. 530-534—Monday, Sept. 10, 1787.

In Convention.—Mr. GERRY moved to reconsider Article 19, viz.:

> "On the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose."

(See the 6th of August, p. 381.)

This Constitution, he said, is to be paramount to the state constitutions. It follows, hence, from this article, that two-thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether. He asked whether this was a situation proper to be run into.

Mr. HAMILTON seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice than the people of a particular state. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new system. The mode proposed was not adequate. The state legislatures will not apply for alterations, but with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case.

Mr. MADISON remarked on the vagueness of the terms, "call a convention for the purpose," as sufficient reason for reconsidering the article. How was a convention to be formed; by what rule decide?—what the force of its acts?

On motion of Mr. GERRY to reconsider:

Massachusetts, Connecticut, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—ay, 9. New Jersey—no, 1. New Hampshire divided.

Mr. SHERMAN moved to add to the article:

"or the legislature may propose amendments to the several states for their approbation; but no amendments shall be binding until consented to by the several states."

Mr. GERRY seconded the motion.

Mr. WILSON moved to insert "two thirds of" before the words "several states"; on which amendment to the motion of Mr. Sherman:

New Hampshire, Pennsylvania, Delaware, Maryland, Virginia—ay, 5. Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, Georgia—no, 6.

Mr. WILSON then moved to insert "three fourths of" before "the several states," which was agreed to *nem. con.*

Mr. MADISON moved to postpone the consideration of the amended proposition in order to take up the following:

"The legislature of the United States, whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid, to all intents and purposes as part thereof, when the same shall have been ratified by three fourths, at least, of the legislatures of the several states, or by the conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the legislature of the United States."

Mr. HAMILTON seconded the motion.

Mr. RUTLEDGE said he never could agree to give power by which the articles relating to slaves might be altered by the states not interested in that property, and prejudiced against

it. In order to obviate this objection these words were added to the proposition.*

"provided that no amendments, which may be made prior to the year 1808, shall in any manner affect the fourth and fifth sections of the seventh article."

The postponement being agreed to,

on the question on the proposition of Mr. Madison and Mr. Hamilton as amended,

Massachusetts, Connecticut, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, ay. 9. Delaware, no, 1; New Hampshire, divided. [pp. 530-532.]

. . . . . .

Mr. Hamilton then moved to postpone article 21 in order to take up the following, containing the ideas he had above expressed, viz.:

"*Resolved*, That the foregoing plan of a Constitution be transmitted to the United States in Congress assembled, in order that, if the same shall be agreed to by them, it may be communicated to the legislatures of the several states, to the end that they may provide for its final ratification, by referring the same to the consideration of a convention of deputies in each state, to be chosen by the people thereof; and that it be recommended to the said legislatures, in their respective acts for organizing such convention, to declare that, if the said convention shall approve of the said Constitution, such approbation shall be binding and conclusive upon the state; and further, that if the said convention shall be of opinion that the same, upon the assent of any nine states thereto, ought to take effect between the states so assenting, such opinion shall thereupon be also binding upon such a state, and the said Constitution shall take effect between the states assenting thereto."

Mr. GERRY seconded the motion.

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* The printed Journal makes the succeeding proviso as to the fourth and fifth sections of the seventh article, moved by Mr. Rutledge, part of the proposition of Mr. Madison.

Mr. Wilson: This motion being seconded, it is necessary now to speak freely. He expressed in strong terms his disapprobation of the expedient proposed, particularly the suspending the plan of the Convention on the approbation of Congress. He declared it to be worse than folly to rely on the concurrence of the Rhode Island members of Congress in the plan. Maryland had voted, on this floor, for requiring the unanimous assent of the thirteen states to the proposed change in the federal system. New York has not been represented for a long time past in the Convention. Many individual deputies from other states have spoken much against the plan. Under these circumstances can it be safe to make the assent of Congress necessary? After spending four or five months in the laborious and arduous task of forming a government for our country, we are ourselves throwing insuperable obstacles in the way of its success.

Mr. Clymer thought that the mode proposed by Mr. Hamilton would fetter and embarrass Congress as much as the original one, since it equally involved a breach of the Articles of Confederation.

Mr. King concurred with Mr. Clymer. If Congress can accede to one mode, they can to the other. If the approbation of Congress be made necessary, and they should not approve, the state legislatures will not propose the plan to conventions; or if the states themselves are to provide that nine states shall suffice to establish the system, that provision will be omitted, everything will go into confusion, and all our labor be lost.

Mr. Rutledge viewed the matter in the same light with Mr. King.

On the question to postpone, in order to take up Col. Hamilton's motion:

> Connecticut—ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia,—no, 10.

A question being then taken on the article 21, it was agreed to unanimously (pp. 533-534).

P. 541—Thursday, Sept. 13, 1787.

Dr. JOHNSON made a further report from the committee of style, &c., of the following resolutions to be substituted for articles 22 and 23:

"*Resolved*, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards be submitted to a convention of delegates chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention assenting to and ratifying the same should give notice thereof to the United States in Congress assembled.

Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same; and a day on which the electors should assemble to vote for the President; and the time and place for commencing proceedings under this Constitution; that, after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president for the sole purpose of receiving, opening, and counting the votes for President, and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution."

Adjourned.

Pp. 551-553—Saturday, Sept. 15, 1787.

Article 5:

> "The Congress, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the legislatures of the several states, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths, at least, of the legislatures of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided, that no amendment which may be made prior to the year 1808 shall in any manner affect the first and fourth clauses in the ninth section of article 1."

Mr. SHERMAN expressed his fears that three-fourths of the states might be brought to do things fatal to particular states; as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the states importing slaves should be extended so as to provide that no state should be affected in its internal police or deprived of its equality in the Senate.

Col. MASON thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the government should become oppressive, as he verily believed would be the case.

Mr. GOUVERNEUR MORRIS and Mr. GERRY moved to amend the article so as to require a convention on application of two-thirds of the states.

Mr. MADISON did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the states as to call a convention on the like application. He saw no objection, however, against providing for a convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum, &c., which in

constitutional regulations ought to be as much as possible avoided.

The motion of GOUVERNEUR MORRIS and Mr. GERRY was agreed to *nem con.*

Mr. SHERMAN moved to strike out of article 5, after "legislatures," the words "three-fourths," and so after the words "conventions," leaving future conventions to act in this matter, like the present convention, according to circumstances.

On this motion:

> Massachusetts, Connecticut, New Jersey—ay, 3; Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 7; New Hampshire, divided.

Mr. GERRY moved to strike out the words "or by conventions in three-fourths thereof." On which motion:

> Connecticut—ay, 1; New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 10.

Mr. SHERMAN moved, according to his idea above expressed, to annex to the end of the article a further proviso:

> "that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the senate."

Mr. MADISON: Begin with these special provisos, and every state will insist on them, for their boundaries, exports, &c.

On the motion of Mr. Sherman:

> Connecticut, New Jersey, Delaware—ay, 3; New Hampshire; Massachusetts, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia—no, 8.

Mr. SHERMAN then moved to strike out article 5 altogether.

Mr. BREARLY seconded the motion; on which:

> Connecticut, New Jersey—ay, 2; New Hampshire, Massachusetts, Pennsylvania, Maryland, Virginia, North

Carolina, South Carolina, Georgia—no, 8. Delaware divided.

Mr. GOUVERNEUR & MORRIS moved to annex a further proviso

"that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it, or, on the question, saying no.

Col. MASON, expressing his discontent at the power given to Congress, by a bare majority, to pass navigation acts, which he said would not only enhance the freight (a consequence he did not so much regard), but would enable a few rich merchants in Philadelphia, New York and Boston to monopolize the staples of the Southern States, and reduce their value perhaps fifty per cent., moved a further proviso

"that no law in the nature of a navigation act be passed before the year 1808, without the consent of two-thirds of each branch of the legislature."

On which motion:

Maryland, Virginia, Georgia—ay, 3; New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, South Carolina—no, 7; North Carolina, absent.

* * * * * * *

On the question to agree to the Constitution, as amended, all the states, ay.

The Constitution was then ordered to be engrossed, and the House adjourned (p. 553).

APPENDIX C.

Madison (June 5):

"• • • Mr. M[adison] thought this provision essential. The articles of Confedn. themselves were defective in this respect, resting in many of the States on the Legislative sanction only. Hence in conflicts between acts of the States, and of Congs. especially where the former are of posterior date, and the decision is to be made by State Tribunals, an uncertainty must necessarily prevail, or rather perhaps a certain decision in favor of the State authority. He suggested also that as far as the articles of Union were to be considered as a Treaty only of a particular sort, among the Governments of Independent States, the doctrine might be set up that a breach of any one article, by any of the parties, absolved the other parties from (the whole) obligation. For these (reasons as well as others) he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form, and by the supreme authority of the people themselves" (1 Farrand, 122, 123).

Madison (June 6):

"*the 15th or last resolve, That the amendment which shall be offered to the confederation, ought at a proper time or times after the approbation of congress to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people, to consider and decide thereon, was taken into consideration.*

Mr. Madison endeavored to enforce the necessity of this resolve—because the new national constitution ought to have the highest source of authority, at least paramount to the powers of the respective constitutions of the states—points out the mischiefs that have arisen in the old confederation, which depends upon no higher authority than the confirmation of an ordinary act of a legislature—Instances the law operation of treaties, when contravened by any antecedent acts of a particular state" (1 Farrand, 126-127).

Madison:

"* * * He observed that the plan of Mr. Patson besides omitting a controul over the States as a general defence of the federal prerogatives was particularly defective in two of its provisions. I. Its ratification was not to be by the people at large, but by the *Legislatures*. It could not therefore render the acts of Congs. in pursuance of their powers even legally *paramount* to the Acts of the States" (1 Farrand, 317).

Yates (June 19):

"Mr. Madison: This is an important question—Many persons scruple the powers of the convention. If this remark had any weight, it is equally applicable to the adoption of either plan. The difference of drawing the powers in the one from the people and in the other from the states, does not affect the powers. There are two states in the union where the members of congress are chosen by the people. A new government must be made. Our all is depending on it; and if we have but a clause that the people will adopt, there is then a chance for our preservation. Although all the states have assented to the confederation, an infraction of any one article by one of the states is a dissolution of the whole. This is the doctrine of the civil law on treaties" (1 Farrand, 325, 326).

The Federalist.

Madison (No. XXXIX):

First. In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

On examining the first relation, it appears, on one hand, that the constitution is to be founded on the *assent and ratification of the people of America, given by deputies elected for the special purpose;* but on the other,

that this assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong. It is to be the assent and ratification of the several states, derived from the supreme authority in each state—the authority of the people themselves. The act, therefore, establishing the constitution, will not be a *national*, but a *federal* act.

That it will be a federal, and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the states. It must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority; in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and *only to be bound by its own voluntary act. In this relation, then, the new constitution will*, if established, *be federal*, and not a *national* constitution.

* * * * * * * *

In this relation, then, the proposed government cannot be deemed a *national one;* since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.

* * * * * * * *

If we try the constitution by its last relation, to the authority by which amendments are to be made, we find

it neither wholly *national*, or wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established government. Were it wholly federal on the other hand, the concurrence of each state in the union would be essential to every alteration that would be binding on all. The mode provided by the plan of the convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *states*, not by *citizens*, it departs from the *national*, and advances towards the *federal* character. In rendering the concurrence of less than the whole number of states sufficient, it loses again the *federal*, and partakes of the *national* character.

The proposed constitution, therefore, even when tested by the rules laid down by its antagonists, is in strictness, neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national."

Madison (No. XLIII):

"It has been heretofore noted among the defects of the confederation, *that in many of the states, it had received no higher sanction than a mere legislative ratification.* The principle of reciprocality seems to require that its obligation on the other states should be reduced to the same standard. *A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties.*"

Madison (No. XLIX):

"As the people are the only legitimate fountain of power, and it is from them that the constitutional

charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, *not* only whenever it may be necessary to enlarge, diminish, or new-model the powers of government; but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Wilson of Pennsylvania said:

> "But I return to my general reasoning. *My position is, sir, that, in this country, the supreme, absolute and uncontrollable power resides in the people at large; they have vested certain proportions of this power in the state governments; but that the fee simple continues, resides and remains with the body of the people*" (2 Elliot's Debates, 457-458).

Debating the adoption of the Constitution in the South Carolina Convention, Mr. Pinckney said:

> "For a people thus situated is a government to be formed * * * a people who have the justest opinion of their civil and religious rights, and who have risked everything in asserting and defending them.
>
> In every government there necessarily exists a power from which there is no appeal, and which, for that reason, may be formed absolute and uncontrollable.
>
> The person or assembly in whom this power resides is called the sovereign or supreme power of the state. *With us, the sovereignty of the Union is in the people*" (4 Elliott's Debates, 328).

The overriding importance of the debates in the State Conventions for purposes of interpretation of the Constitution has been nowhere better stated than by Madison, in the following words, in the House of Representatives:

> "But, after all, whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as

the oracular guide in expounding the Constitution. As the instrument came from them it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions. If we were to look, therefore, for the meaning of the instrument beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution" (3 Farrand's Records, 374).

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No. 606

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1930.

THE UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF SUBMITTED BY JEREMIAH M. EVARTS, ESQ., *AMICUS CURIAE.*

JEREMIAH M. EVARTS,
Amicus Curiae.

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INDEX OF POINTS.

PAGE

Statement 1

Question 2

Summary of Argument 2

I. The sovereign power of the People of the United States. State and Nation are each the servant and agent of the People 3

A. The Nation and Its Source of Power 3

1. The intention of the framers of the Constitution to create a republican form of government, one in which the people retained sovereignty, is clearly expressed throughout the proceedings leading up to the adoption of the Constitution 3

2. The Supreme Court of the United States has construed the Constitution and declared that the nation and its government were created of the people, by the people and for the people 6

3. The people of the United States for generations have believed in this conception of government of the people, by the people, and for the people 8

B. The State and Its Source of Power 9

II. The Amending Power 11

A. Article V of the Constitution 11

The Power of Selection Is a Power Delegated to the United States by Article V of the Constitution, *But*, the Power of Adoption Is Not a Power Delegated to the United States by Article V of the Constitution 11

B. The Preamble and the X Amendment 15

III. The People of the United States of America, in the exercise of their sovereign power, have the sole power to change the form of government and the right to exercise that power 21

Conclusion 24

Index of Authorities.

PAGE

Cohens v. Virginia, 6 Wheat. 264 ..... 16, 19, 23
Declaration of Independence 2
Elliot's Debates 3, 4, 5, 21
Farrand, Records of the Federal Convention 4
Federalist 5, 21-22
Gibbons v. Ogden, 9 Wheat. 1 ..... 14, 17
Hawke v. Smith, No. 1, 253 U. S. 221 19
Kansas v. Colorado, 206 U. S. 46 ..... 6, 7, 12, 16, 17, 21
Leser v. Garnett, 258 U. S. 130, 136 19
Marbury v. Madison, 1 Cranch 137 ..... 6, 18
McCulloch v. Maryland, 4 Wheat. 316 .. 6, 9, 12, 15, 18, 20, 22
United States v. Sprague and Howey, unreported decision 11
Webster, Reply to Hayne 9, 10

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Statement.

The brief here presented as *amicus curiae* does not touch upon the question of *stare decisis*. That question is treated in counsel's brief. It does not consider the effect of the argument upon amendments to the Constitution, other than the XVIII, as that question is likewise fully considered in counsel's brief. Nor will this brief go exhaustively into the history of the adoption of the Constitution and the history of the X Amendment, which matters are fully treated in counsel's brief.

It is sought here to present what is regarded as the fundamental question in the case and to deal with that question alone.

Question.

Is the XVIII Amendment of the Constitution of the United States unconstitutional for the reason that an amendment of such a character under the Constitution of the United States could only be adopted by the people of three-quarters of the several states in constitutional convention assembled?

Summary of Argument.

The contention here presented is: That the People of the United States in the exercise of their sovereign power adopted their Constitution and thereby created their Nation and its government; that the People granted to that Nation and its government certain limited powers over themselves and their rights; that under the Preamble of the Constitution and the X Amendment thereto, the People of the United States alone can make a further grant of power over themselves and their rights to the Federal Government, their agent and servant.

It is respectfully submitted that the question in this case involves the fundamentals of law and government in this nation. It involves the great principles of political liberty set forth in the Declaration of Independence as follows:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. *That to secure these Rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the right of the People to alter or abolish it, and to institute new Government, laying its foundations on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*"*

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* NOTE. Italics used in this brief are the writer's.

I.

The sovereign power of the People of the United States. State and Nation are each the servant and agent of the People.

A. The Nation and Its Source of Power.

It is unnecessary to elaborate on the conditions surrounding the confederation of the States. It was merely a compact between the states, destructible at will by the states. The necessity of forming a more perfect union became apparent to all. We are interested here solely with the nature of the government by which that more perfect union was effected.

In order to solve the question of the nature of the new government obviously it is necessary to examine the expressed intention of the framers of the Constitution and the government created thereby.

1. The intention of the framers of the Constitution to create a republican form of government, one in which the people retained sovereignty, is clearly expressed throughout the proceedings leading up to the adoption of the Constitution.

The People of the United States were recognized as the sole source of power.

Wilson of Pennsylvania said:

> "But I return to my general reasoning. My position is, sir, that, in this country, the supreme, absolute and uncontrollable power resides in the people at large; they have vested certain proportions of this power in the state governments; but that the fee simple continues resides, and remains with the body of the people."
>
> (2 Elliot's Debates, 457-458.)

Pinckney of South Carolina said:

> "For a people thus situated is a government to be formed * * * a people who have the justest opinion of their civil and religious rights, and who have risked everything in asserting and defending them.
>
> "In every government there necessarily exists a power from which there is no appeal, and which, for that reason, may be termed absolute and uncontrollable.
>
> "The person or assembly in whom this power resides is called the sovereign or supreme power of the state. With us, the sovereignty of the Union is in the People."
>
> (4 Ell. Deb. 328.)

The People alone could grant power to this new nation of *their* creation. That fact was recognized.

> "Col. Mason considered a reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. And he knew of no power in any of the Constitutions, he knew there was no power in some of them, that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. *It was of great moment he observed that this doctrine should be cherished as the basis of free government.* Another strong reason was that admitting the Legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding Legislatures having equal authority could undo the acts of their predecessors: and the National Government would stand in each State on the weak and tottering foundation of an Act of Assembly."
>
> 2 Farrand, Records of the Federal Convention, 88-90.

The intention to create the Nation and its Government as their agent and servant is nowhere better expressed than in the Preamble of the Constitution which reads as follows:

> "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Therein is stated the nature of the government intended, the source of the power granted, and the purposes for which the nation and its government was created. To the framers of the Constitution those words were not superfluous. They had a very definite meaning. As Hamilton said, in arguing against the necessity of any express reservation of the rights of the People:

> "Here, in strictness, the people *surrender nothing;* and as they *retain everything* they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity do *ordain* and *establish* this Constitution for the United States of America'! This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State Bills of Rights."
>
> The Federalist Cap. LXXXIV.

The framers of the Constitution did not believe that the instrument which they had created for the purpose of giving birth to a new nation robbed the people of their sovereign power. As Wilson well said in the Pennsylvania convention:

> "The late Convention were assembled to devise some plan for the security, safety and happiness of the people of the United States. If they have devised a plan that robs them of their power, and constitute an aristocracy, they are the parricides of their country and ought to be punished as such."
>
> 2 Elliot's Debates, 523.

2. The Supreme Court of the United States has construed the Constitution and declared that the nation and its government were created of the people, by the people and for the people.

That proposition was definitely declared by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 403-404:

> "From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.' * * *
>
> "But when, 'in order to form a more perfect union', it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.
>
> "The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

The powers so granted by the people to the government of *their* creation were held by the court to be limited powers. In *Marbury* v. *Madison*, 1 Cranch, 137, 176, the Court said:

> "To what purposes are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed."

And as late as 1906 these doctrines were reaffirmed in *Kansas* v. *Colorado*, 206 U. S. 46, 88-90, as follows:

"The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit, 'The people'. Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'We, the people of the United States', not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States."

Only one conclusion can be drawn from these cases. The people created *their* nation and its form of government. All

powers granted to the national government were derived *from the people* as the *sole* source of sovereign power. The powers so granted were *limited* powers to be exercised directly on the people and for their benefit. Did the people grant to any other servant and agent of *their* creation the power to confer additional power over the people and their rights to this other agent and servant of their creation, the national government?

3. The people of the United States for generations have believed in this conception of government of the people, by the people, and for the people.

This fact is apparent. Generations have studied and believed the principles of sovereignty and government laid down by Jefferson, Marshall, Webster and Lincoln. As Lincoln declared, one generation fought the Civil War in order that "government of the people, by the people, for the people, shall not perish from the earth".

The writer's generation fought in another war thirteen years ago. The rallying cry of that war was "The War to save Democracy".

May one ignore the cause for which this nation was created, the cause for which generations fought and died! Words are scarcely necessary to emphasize a fact which has been written with the blood of the People of this Nation.

Therefore, the question now is: Have the people of the United States acted under a *misconception* of the form of government which they conferred upon this servant and agent of *their* creation? Have the people conferred upon their other agents and servants, the State Governments, the power to grant additional powers over the people and their rights, without the consent of the people, to their other agent and servant, the national government?

B. The State and Its Source of Power.

The People of the United States are not only citizens of the United States but also citizens of their respective states. In the latter capacity the citizens of the States created another agent and servant, the State. The Nation and its government was created for one purpose. The State and its government was created for another purpose. Its power was likewise derived from the People. The People of the State established the State for the purpose of *exercising local self government*. The prevailing desire for local self government is well expressed in these words of Marshall:

> "Would the people of any one State trust those of another with the power to control the most insignificant operations of their State Government? We know they would not."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 431.

The State government and its legislature were the servants of the people. As such the state had no power to transfer the power derived from its citizens to another sovereignty.

> "The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves."
>
> *McCulloch* vs. *State of Maryland*, 4 Wheat. 316, 404.

The State as the servant of the people had no power to destroy that other servant of the people, the National government. As Daniel Webster stated the proposition in the Reply to Hayne:

> "And now, sir, I repeat, how is it that a State legislature acquires any power to interfere? Who, or what, gives them the right to say to the people, 'We, who are your agents and servants for one purpose, will undertake to decide, that your other agents and servants, appointed by you for another purpose, have transcended

> the authority you gave them!' The reply would be, I think not impertinent, 'Who made you a judge over another's servants? To their own masters they stand or fall'."
>
> Second speech on Foot's Resolution, Works of Daniel Webster, 6th Ed. Vol. 3, p. 335.

The Civil War established the proposition that the State had no power to destroy.

The queston involved in this case is the reverse of the proposition then confronting the people, to wit: Have the States as agents and servants of the people, the power to create without the consent of the people; i. e., the power to confer, without the consent of the people, additional power over the people and their rights to that other agent and servant created by the people, the national government?

It is respectfully submitted: (1) that such power does not exist under the Constitutions of the States; (2) it does not exist under the Constitution of the United States; (3) the existence of such power is contrary to the conception of the form of government intended by the framers of the Constitution; it is contrary to the construction of that instrument by this Court; and it is contrary to the conception of the People of the United States of the form of government created by themselves and which they for generations have believed existed.

II.

The Amending Power.

A. Article V of the Constitution.

The Power of Selection Is a Power Delegated to the United States by Article V of the Constitution, *But* the Power of Adoption Is Not a Power Delegated to the United States by Article V of the Constitution.

If the power to create exists in the State Legislatures it can be found only in Article V of the Constitution.

That article reads as follows:

> "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate."

It is admitted that the power of selection is delegated to the United States, and that power is the *only* power delegated by this article. The Congress in exercising that power is exercising an administrative and not a legislative function. In the exercise of that administrative function it must use discretion. Its action is subject to review.

Decision of Judge Clark Below.

Under the Constitution certain limited powers were granted to the Federal government by the people. All other powers not prohibited to the States were reserved to the States or to the people.

Kansas v. *Colorado*, 206 U. S. 46, 89-90.

There are five distinct kinds of Amendments to the Federal Constitution:

1. Amendments which constitute a surrender of power previously granted to the National Government by the people.

2. Amendments which constitute a surrender of power previously granted to the State Government by the people.

3. Amendments constituting an additional grant of power over the people and their rights to the National Government.

4. Amendments regulating powers previously granted, but not increasing powers over the people.

5. Amendments which expressly declare implied limitations on the power of the Government.

In the latter two classes we are not interested.

The first two classes surrender power previously granted. The third class is an additional grant of power over the people, the sole source of any such power. In them sole sovereignty resides, and they alone can part with it.

The Amendment here in question falls in the third class. It is our contention that the power to adopt such an amendment and to grant such additional direct power over the people resides in the people alone, as the sole source of sovereign power.

McCulloch v. *Maryland, supra;*
Kansas v. *Colorado, supra.*

Congress in the exercise of its administrative power of selection *must* examine the nature of the proposed amendment. If the proposed amendment seeks to create new power in the federal government over the people and their rights, then Congress *must* select the people as having the sole power to adopt and, by their adoption, grant new power over themselves and their rights to their agent and servant.

That, we respectfully submit, is the true meaning of Article V as read in conjunction with the Preamble of the Constitution and the X Amendment.

It may be said that a presumption exists that Congress properly exercised the administrative power of selection. But the *proper* exercise depends solely upon the character of the amendment. The presumption is rebutted in the instant case. The amendment in the instant case obviously attempts to confer additional power over the people and their rights. It was not even intended to be submitted to the people. It was expressly proposed by Congress "to the States."

The government, however, contends that Article V reposes unrestrained arbitrary power in Congress to choose the first of the two alternative methods of ratification provided. And this irrespective of the fact that the proposed amendment grants additional power over the People and their rights to their agent and servant, the national government. Let us examine this contention. The mere fact that two methods of ratification are provided shows some intention to have existed on the part of the framers of the instrument. Otherwise only one method would have been provided. The admission of an intent on the part of the makers of the instrument is as well an admission of purpose, and it is apparent that the two methods of ratification differ. Then it must be true that it was the intent and purpose that one method should be used under one set of circumstances and the other method under a different set of circumstances. To ascertain definitely we must look to the dominant spirit of the instrument, and this is to be found in the Preamble which states the purpose for which and the belief in which the nation was

founded. If Congress had an arbitrary and unrestrained power of selection then the great purposes set forth in the Preamble are at the mercy of Congress and the State Legislatures. Sovereignty ceases to exist in the People *because sovereignty implies the power to exercise it, and the power to exercise would be elsewhere than in the People.* The purposes of the Preamble control. This was true, we believe, originally, but it was subsequently definitely expressed in the Tenth Amendment.

Even before the adoption of the Tenth Amendment Article V was controlled by the Preamble and, therefore, did not in and of itself confer an arbitrary and unrestrained power of selection upon the Congress. As Chief Justice Marshall stated the rule of construction in the great case of *Gibbons* vs. *Ogden:*

> "If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. * * * We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."
>
> *Gibbons* v. *Ogden*, 9 Wheat. 1, 188-189.

We respectfully submit that the government's contention is unsound. It is not in accordance with the rule of construction quoted above. It is not in accordance with the theory of the Constitution and the theory of government created thereby, as construed by this great court for more than a century, intended by its creators, and believed to exist by the People of the United States of America.

Furthermore, if any such arbitrary and unrestrained power of selection *ever* existed, such power was *revoked* by the Tenth Amendment, under which the People retain their sole sovereign power.

B. The Preamble and the X Amendment.

The Preamble of the Constitution states who framed the Constitution and created this Nation. It reads as follows:

> "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The question of law in this case hinges in the last analysis on the meaning of the word "People". As respects the Preamble the meaning of that word has been construed by Chief Justice Marshall in his most famous opinion, *McCulloch* v. *Maryland*, 4 Wheat. 316, 402-403:

> "The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligations or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might be submitted to a Convention of Delegates, chosen in each State *by the People thereof*, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted, and by the Convention, by Congress, and by the State Legislatures, *the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention.* It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. *But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.*"

Again, in the case of *Cohens* v. *Virginia*, 6 Wheat. 264, at the top of page 381, Chief Justice Marshall said:

> "The American people, in conventions of their respective States, adopted the present Constitution."

These quotations show beyond peradventure of a doubt that the Court considered the Constitution to have been adopted by *the People* acting through their duly authorized representatives in Constitutional Conventions assembled. "*The People of the United States*" as that term is used in the Preamble must be those citizens entitled to elect representatives to Constitutional Conventions. It is respectfully submitted that there is no other reasonable construction of the words.

The X Amendment to the Constitution reads as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The words "The People" as used in the X Amendment must mean exactly the same as the words in the Preamble. Such is the only reasonable construction of these words.

Such construction was placed upon these words by this Court in 1906 in the case of *Kansas* v. *Colorado*, where the Court said:

> "The proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the X Amendment. *This amendment, which was seemingly adopted with prescience of just such widespread fear that the National Government*

> *might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.* It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people'. *Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted.* The preamble of the Constitution declares who framed it, "We, the people of the 'United States', not the people of one State, but the people of all the States, and Article X reserves to the people of all the States the powers not delegated to the United States. *The powers affecting the internal affairs of the States* not granted to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States* respectively, *and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States.*"
>
> *Kansas* v. *Colorado*, 206 U. S. 46, 89-90.

The construction of the words "The People" by Chief Justice Marshall in 1819 and by Mr. Justice Brewer speaking for the Court in 1906, is in complete accord with the intention of the framers of the Constitution. It is in complete accord with that conception of government and political liberty in which the People of the United States then, and ever since have believed.

It is respectfully submitted that the V Article of the Constitution *must* be read in conjunction with the Preamble and the X Amendment in accordance with the rule of construction laid down by Chief Justice Marshall in *Gibbons* v. *Ogden*, *supra*. Originally all powers of the Federal government were derived from the People as the sole source of

Sovereign power. *McCulloch* v. *Maryland, supra.* The People granted to that government of their creation limited powers over themselves and their rights. *Marbury* v. *Madison, supra.* What power was *reserved* to the People by the X Amendment, *unless* it was the sole power to grant to their agent and servant which *they* created, additional power over themselves and their rights?

It may be argued that the legislatures in fact represent the People for the purpose of conferring additional power over the People and their rights to the Federal government. Let us examine this argument.

Take for example a representative in the State Legislature of the State of Vermont. He is solely authorized by his constituents to represent them in the Legislature of the State of Vermont as their agent and servant in accordance with the limited powers, granted by the People of that State to that State, and enumerated in the Constitution of that State. There is nothing in that Constitution which authorizes that legislature to create in the Federal government additional power over the people of the State of Vermont and their rights or over the people of any other State. The legislature of a state is not elected for such a purpose. It is elected for other purposes.

For the purpose of argument, let us assume that in March 1931, four months after his election to the Legislature of that State, a proposed amendment to the Constitution of the United States repealing or modifying the First Amendment to the Constitution doing away with the right of free speech, freedom of the press and peaceable assembly, or any other amendment increasing the power of the Federal government over the people, is submitted to the Legislature for adoption. At the time of the election in the fall of 1930 the question of the adoption of such an amendment was not dreamed of by the People of that State. Can anyone say that the Legislature *in fact* represents the People of the State of Vermont for the purpose of adopting such amendment to the Constitution of the United States? We respectfully submit that this question

needs no answer. Can anyone say, that when the legislature of the State of Vermont attempts to grant that additional power over the People of the State of Vermont and their rights to their other agent and servant it does so *with the consent of the people of Vermont?* It is submitted that this question likewise needs no answer. In *Hawke* v. *Smith*, No. 1, 253 U. S. 221, and *Leser* v. *Garnett*, 258 U. S. 130, 136, the Court ruled that a State legislature in ratifying a proposed amendment to the Federal Constitution is performing a Federal function derived from the Federal Constitution, and that, in the exercise of such function, the legislature transcends any limitations sought to be imposed by the People of a State. That ruling necessarily denies any possible *presumption in law* that the Legislature is acting as representative of the People. Therefore, on the proposition stated, *as a matter of fact*, the Legislature of the State of Vermont does not represent the people of that State in adopting such proposed amendment. *As a matter of law* it has not been given authority under the Constitution of that State to grant to the Federal Government additional power over the People and their rights. As a *matter of law* under the ruling in *Hawke* v. *Smith* and *Leser* v. *Barnett*, it does not represent the people of the State of Vermont when it attempts to grant such additional power to the national government over the people of that State and other States in the exercise of a Federal function.

This Court for a century has construed the Constitution to the effect that all powers of the Federal government were derived from the people as the sole source of sovereign power. The people granted to their government of *their* creation limited powers over themselves and their rights. The Federal government is *their* agent and servant. What is the purpose of having a written Constitution? As Chief Justice Marshall said in *Cohens* v. *Virginia*, 6 Wheat. 264, at page 387:

> "The Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. * * * It is exposed to storms

> and tempests, and its framers must be unwise statesmen indeed, if they have not provided it as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter."

The Preamble states the purposes to be preserved. The Tenth Amendment provides the means of self preservation.

The Preamble to the Constitution is an expression of the form of government intended and the great purposes for which this nation was created. *McCulloch* v. *Maryland*, *supra*. The People of the United States created *their* nation and defined in *their* Constitution *their* reasons for doing so. The People of the United States declared in the Tenth Amendment that they reserved the powers not delegated to *their* nation and its government. What were those powers unless it was the sole power to grant to *their* agent and servant additional power over themselves and their rights? It is respectfully submitted that the X Amendment was provided as the means of self preservation of the form of government not only intended to be created but held by this Court to have been created. *McCulloch* v. *Maryland*, *supra*; *Kansas* v. *Colorado*, *supra*. It is respectfully submitted that the Tenth Amendment perpetuates the liberties and the sovereign powers of the People of the United States, *for which purpose they adopted the Constitution*. What other reasonable construction of the words "or to the people" in the X Amendment is possible? Does not any other construction render the X Amendment superfluous? It is a first principle of constitutional construction that no part of the Constitution can be disregarded.

Our construction of the amending power as limited by the Preamble and the Tenth Amendment perpetuates the fundamental principles of political liberty contained in the Declaration of Independence. It perpetuates for ourselves and our posterity the Blessings of Liberty and the form of government intended by the framers of the Constitution. It perpetuates the construction of the fundamental principles of that great instrument laid down by this Court in 1819 in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, 403-405; and

again in 1906 in the case of *Kansas* v. *Colorado*, 206 U. S. 46, 89, 90. It perpetuates the Sovereign Power of the People of the United States of America over their agents and servants, both of State and Nation.

III.

The People of the United States of America, in the exercise of their sovereign power, have the sole power to change the form of government and the right to exercise that power.

This case resolves itself into one of two propositions.

FIRST: Under the narrow construction of Article V of the Constitution contended for by the government in this case, the People of the United States conferred upon the Legislatures of the several States the power to adopt unlimited amendments to the Constitution of the United States, granting further power over the people and their rights to that other agent and servant created by the people, the Federal government. That is the Government's proposition! If such be the case, the People of the United States subjected themselves *unwittingly* to the whim and caprice of a bare majority of a quorum in the Legislatures in three-fourths of the several States, such legislatures acting on a question not even submitted to the People for consideration.

It is submitted that if such be the fact, the form of government so created was *unwittingly* created. To repeat the words of Wilson at the Pennsylvania Convention, *supra:*

> "The late Convention were assembled to devise some plan for the security, safety and happiness of the people of the United States. If they have devised a plan that robs them of their power, and constitute an aristocracy, they are the parricides of their country and ought to be punished as such."

We also repeat the words of Hamilton, *supra:*

> "Here, in strictness, the people *surrender nothing;* and as they *retain everything* they have no need of particular reservations. 'We the people of the United States, to secure the blessings of liberty to ourselves and our posterity do *ordain* and *establish* this Constitution for the United States of America.' This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State Bills of Rights."

And as Chief Justice Marshall said:

> "Would the people of any one State trust those of another with the power to control the most insignificant operations of their State government? We know they would not."
>
> *McCulloch* v. *Maryland*, 4 Wheat. 316, 431.

How much less would they have trusted a bare majority of a quorum in the legislatures of three-fourths of the States!

Shall we *now* say that Hamilton, Wilson, Madison, Pinckney, and Mason did not know what they were doing, and did not realize the nature of the instrument which they were formulating? In the light of the printed word no such conclusion can be reached. On the contrary we are driven to the conclusion that they not only knew that the Sovereign power rested in the People, but that they *intended* it should *remain* in the People. Therefore the contention of the government in this first proposition *must* fall.

If this Court hold that the People of the United States did in fact create that hated form of government, an oligarchy, then the sole remedy of the people is to amend Article V of the Constitution to provide, that hereafter all amendments to the Federal Constitution conferring additional power to the Federal Government over the People and their rights can only be adopted by the People in constitutional conventions assembled in their respective States. Even such attempt to reform their agent and servant is subject to the

whim and caprice of the agents and servants themselves—both State and Federal!

SECOND: A "government of the people, by the people, for the people" was created under the Constitution of the United States, wherein the people as the sole source of sovereign power, reserved to themselves alone, in the exercise of that sovereign power, the sole power to grant additional power over themselves and their rights to their agent and servant, the Federal Government. There is here created in truth a republican form of government, in which the People retain sovereignty. Under such construction of the nature of the Constitution and such conception of the form of government created thereby, the People *remain* the sole source of sovereign power. It is respectfully submitted that this great Court construed the Constitution to have created a Republican form of government, one in which the people retained their sovereignty. The Preamble and the Tenth Amendment perpetuates that form of government and its principles of political liberty.

Under that form of government and its principles of political liberty the People of the United States *alone* can grant additional power over themselves and their rights to their agent and servant. An attempted exercise of that power by any or all their agents and servants is a usurpation of the Sovereign Power of the People of the United States. The People alone have the power to *change* their form of government. As Chief Justice Marshall said in the great case of *Cohens* v. *Virginia*:

> "The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or unmake, resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it."

Cohens v. *Virginia*, 6 Wheat. 264, 389.

CONCLUSION.

The question in this case involves the sole source of all power in this nation. It involves the base upon which all law and government in this nation stand. It involves the political liberty of one hundred and twenty million people *and their posterity*. The question is: Did the People of the United States of America, in the exercise of their Sovereign Power, reserve to themselves alone, under the Preamble and the X Amendment to the Constitution, the *sole power to grant to their agent and servant* additional power over themselves and their rights?

It is submitted to this great Court that the People of the United States of America, the Sovereign Power of this Nation, are entitled to the answer of this Court to this question.

Respectfully submitted,

JEREMIAH M. EVARTS,
Amicus Curiae.

FILE COPY

JAN 20 1931

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM H. SPRAGUE AND
WILLIAM J. HOWEY,
} No. 606

BRIEF AS AMICUS CURIAE

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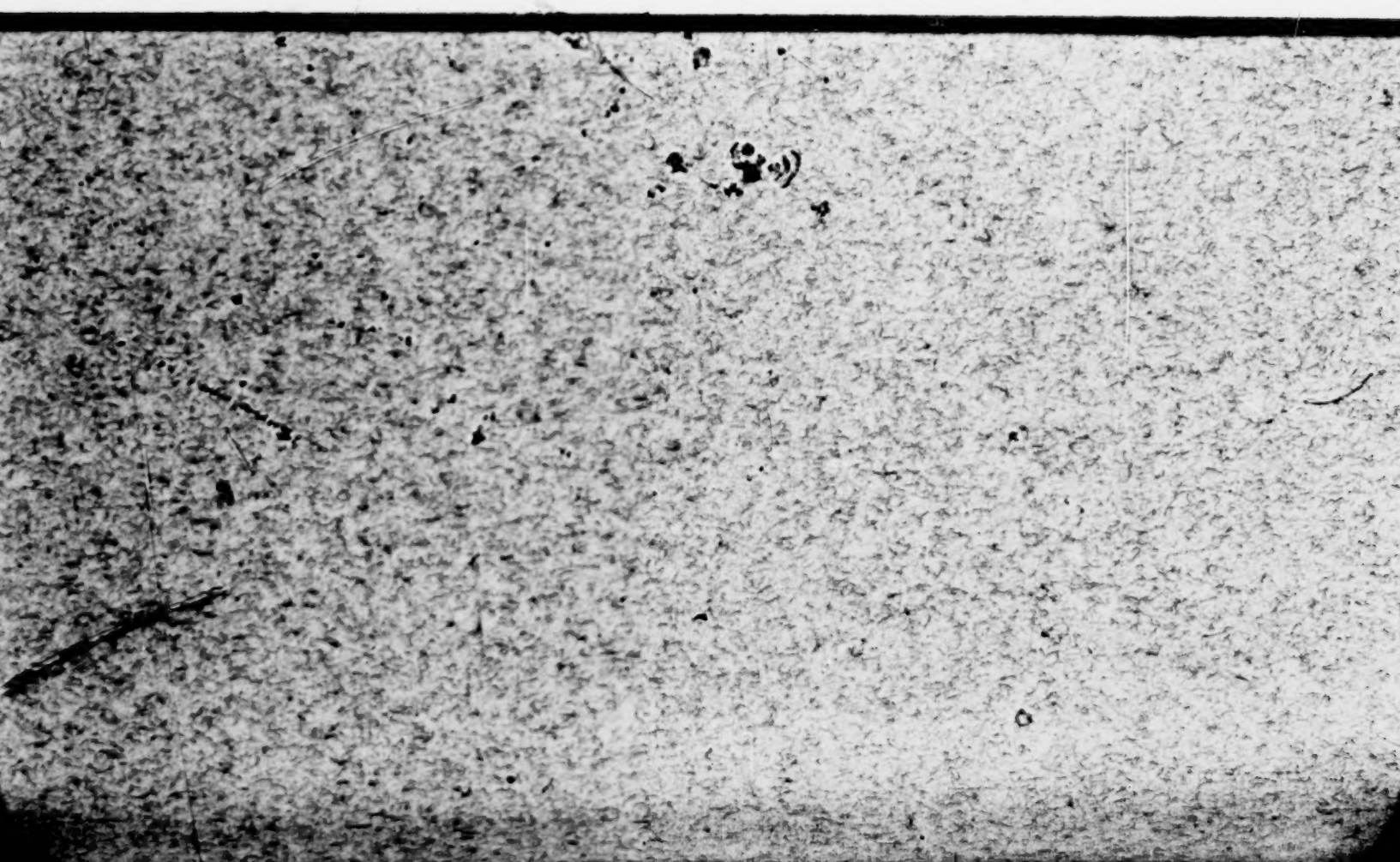

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1930

THE UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM H. SPRAGUE AND
WILLIAM J. HOWES,
No. 606

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

WILLIAM H. CRICHTON-CLARKE,
As Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES

THE UNITED STATES OF AMERICA,
Appellant,
vs.
WILLIAM H. SPRAGUE AND
WILLIAM J. HOWEY,
} No. 606

BRIEF AS AMICUS CURIAE

May it please the Court

The question presented for decision is whether or not Congress possesses the right finally, conclusively and even erroneously, to determine that a power possessed by the people as such may be surrendered or destroyed by three-fourths of the State Legislatures if two thirds of Congress shall so propose.

That is to say: Could the people, or any citizens, against their consent, be deprived of, for example, the right to trial by jury or be subjected to cruel and unusual punishment through the act of some fifteen hundred public officials constituting two-thirds of Congress and bare majorities in the Legislatures of three-fourths of the States without this Court having any right of review?

The Court in this case is presented with a momentous question. The reversal of the decision below on the ground that the Court has no power to review the proposal by Congress that any kind of an amendment shall be ratified by State Legislatures rather than by people's conventions, would open the door, under not improbable circumstances, to a quick transformation of our government from a basis

of individualism to one of communism or socialism if only about 10 per cent of fanatical voters should determine to exercise a balance of power as constituents of two-thirds of the Congress and of bare majorities in three-fourths of the State Legislatures.

At the threshold of the case lies the great question whether the people, or this Court, have any power to force the use of the secret or Australian ballot into any proposal for Constitutional amendment if they believe the vital interests of the nation require such action.

This is the fundamental issue before the Court.

When the Constitution is amended by two thirds of Congress and majorities in three fourths of the State Legislatures, *every single vote which thus changes the Constitution is or may be made a public or roll-call vote.* There is not a single secret ballot involved in either Congress or any State Legislature.

When the Constitution is to be amended by two-thirds of the Congress and by constitutional conventions of three-fourths of the States, the deciding ballots, namely, those by which the people elect delegates to the constitutional conventions, are secret or Australian ballots.

The distinction is a vital one. A Congressman's or a Legislature's vote, being a public one, may be coerced. A fanatical minority can cow him by threatening to swing away enough votes to defeat him in the next election. Thus small groups of intolerant and persevering zealots by representing the balance of power—by standing at the center of the see-saw of public opinion and swinging it this way or that—can use all the alarming leverage of modern propaganda and publicity to force their political views into the Constitution. No such dangerous forces can be brought to bear upon voters in their individual booths, marking their secret ballots. No one would call a Congressman or Legislature a free agent where his public vote will arouse a host of fanatical enemies, but a citizen in his secret voting cell is free to vote his real opinion.

The central consideration in this case is whether this Court can force the use of the secret ballot in voting upon grossly political or controversial amendments affecting peoples' powers or rights, by reviewing the action of Congress in choosing either the public ballot or the secret ballot method of constitutional amendment.

How the Question Arises

Only three great, controversial provisions have ever gotten into the Federal Constitution and thus endangered it by throwing it into the maelstrom of politics. War got two of these political provisions out of the Constitution. War got the other one into it.

Make no mistake. Politics often are embalmed into law without ceasing to be politics. The old Stamp Act was embalmed politics. The British Parliament enacted its fiat, and the American patriots brewed tea in Boston Harbor and finally rewrote the British Colonial Constitutions in the blood of the Revolutionary War.

The end of that struggle for white man's freedom merged into the beginning of the struggle for the black man's freedom. The Constitution which guaranteed the blessings of liberty to the white race forged fetters of servitude upon the black race. The Slavery provisions of the Constitution were embalmed politics. No man's conscience was stilled to rest regarding human slavery because it was enshrined in our Federal Constitution. The ferments and fevers of politics were not ended by the decision of this Court in the Dred Scott case.

The greatest war that ever shook this continent repealed the Slavery provisions of the Constitution and brought to an end some sixty years of turmoil, hatred and agitation that were hardly less devastating than war.

By a curious irony, the freeing of black men encompassed the disfranchisement of white and black women, and thus paved the way for a political struggle for women's rights which was waged for some years and terminated as an

aftermath of the World War. The Fourteenth Amendment which freed the blacks, provided that while the right to vote might not be denied to "male inhabitants" unless guilty of "rebellion or other crime," without reduced representation of the denying State, women no matter how innocent they might be of crime or rebellion could be disfranchised without penalty.

Here again was a purely political provision of our Constitution which vast and growing numbers of our citizens resented and struggled with until, during the World War, it threatened to impair our war efforts and shortly thereafter action was taken for its repeal.

The third great piece of embalmed (but very much alive) politics in our Federal Constitution, grew out of the hysteria of the World War. It was thought necessary to divert grain from the distilleries to the troops, and the 18th Amendment was preceded by a war-time prohibition act and "ratified" in the reconstruction days.

People whose power over their personal habits was sought to be surrendered to the Federal Government by vote of State Legislators, have been harangued on many occasions about their sacred duty to obey the political prohibition provisions which purport to have been written into the Constitution by about fifteen hundred harassed Congressmen and Legislators who were threatened with political assassination by anti-saloon zealots who were small in numbers but powerful in energy, perseverance, prejudice and money.

But people are wise. They know politics even when disguised as stamp taxes, or slavery "institutions" or Constitutional amendments. People know when their personal rights or powers are affected no matter how much doubt Courts may entertain.

People demand that there shall be noblesse oblige in laws; that laws which expect to be respected shall be respectable. Tyrants and tyrannical laws may coerce obedience; it is never given to them freely, and it is this spirit

which defines the difference between political and non-political laws.

Can anyone think that a law which rose in the consciences of the people and which was then proposed by Congress for ratification by either conventions or State Legislatures (because Congress knew as a piece of political wisdom that practically all law-abiding people either wanted it or would submit to it) would ever meet with the fate of the 18th Amendment?

Is it demanding too much of Constitutional common-sense to expect that Congress shall be able to distinguish a People's Power from a State's Power, and a Political Amendment from a Non-Political Amendment and act accordingly? And is it expecting too much of Constitutional common-sense for this Court to assert its right to review a Congressional error, rather than to stand by and permit that error to wrack and rend the Constitution?

The Court, it is thought, will take judicial notice of the many proofs that the 18th Amendment is a purely political provision whether it be regarded as a part or as no part of the Constitution.

The attempt of some fifteen hundred men, voting in public, and trembling in their political shoes, to require that people may purchase but shall not manufacture, sell or transport intoxicating liquor has had the following indisputable effects:

1. It has bred a host of bitter enemies and violators of the Constitution among great groups of generally law-abiding citizens who otherwise would venerate and uphold our fundamental law but who now seek to pull it down and trample upon it.

2. It has filled our country with Federal police and spies and our Federal Prisons to bursting with criminals guilty of the grave "Constitutional" crimes of making or selling or transporting (but not of purchasing or consuming) intoxicating liquors.

3. It has been the mother of rackets and a breeder of murder, assassination, corruption, bribery, smuggling, and law-

lessness on a scale of alarming and increasing proportions.

4. It has elevated the bootlegging industry into one of the largest businesses in the country and is spreading its poisons of all kinds through the veins of the country.

These grave, indescribable and increasing evils and crimes springing directly from the 18th Amendment point unerringly to the commission of some deep but undeniable error of judgment or law by Congress or the State Legislatures as well as the dragging of the Constitution down into venomous forms of politics in a vain effort to elevate the liquor traffic into the sublime regions of the Constitution, and if this is true, it is the right and duty of this Court to review and rectify the error which has been made and thus throw the matter once more back into the hands of the people where it belongs.

THE QUESTIONS

The questions which arise on this appeal from a Judgment of the District Court quashing an indictment of Messrs. Sprague and Howey for violating the Constitution of the United States by the high crime and misdemeanor of transporting beer of more than one-half of one per centage of alcohol in half-barrels, are thought to be these:

1. Is the judgment of Congress that a power reserved to the States shall be surrendered to the Federal Government by an amendment proposed for ratification by peoples' conventions, or that a power reserved to the people shall be surrendered to the Federal Government by an amendment proposed for ratification by State Legislatures, a final and conclusive judgment, or may it be reviewed by this Court and rectified by requiring that amendments affecting surrender of States' powers shall be ratified by State action and those surrendering peoples' powers or rights, shall be ratified by peoples' delegates? If the Congressional action of proposing "one or the other mode of ratification" is final and conclusive irrespective of the nature of the power or right surrendered and irrespective of whether it

belongs to or is controlled by the bodies which surrender it, that is the answer to the whole question so far as this Court is concerned and the Constitution is shoved once more down into vortex of politics. But if there are some powers or rights so sacred and fundamental, as guaranteed by the Bill of Rights, that no proposal by Congress and no ratification by State Legislatures could work their surrender, then the second question arises.

2. Does the 18th Amendment involve a surrender or nullification of powers reserved to the people by the Bill of Rights and thus requiring ratification by peoples' conventions? If the answer to this question be No, there is an end of this Court controversy at least.

The PRINCIPLES and AUTHORITIES involved are as follows:

DECLARATION OF INDEPENDENCE.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

PREAMBLE OF THE CONSTITUTION.

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

ARTICLE V OF THE CONSTITUTION.

"The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article (Art. I, Sec. 9, as to 'migration or importation' of slaves, and Clause 4 as to 'capital or other direct tax'); and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

ARTICLE III OF THE CONSTITUTION, Section 2-1:

"The judicial power shall extend to all cases in law and equity arising under this Constitution."

BILL OF RIGHTS, or FIRST TEN AMENDMENTS TO THE CONSTITUTION:

Article I

Prohibits the establishment of religion, and protects the freedom thereof; also the freedom of speech, press, assembly and petition.

Article II

Guarantees the right of the people to keep and bear arms.

Article III

Protects people against quartering of soldiers in time of peace et cetera.

Article IV

Secures people in their persons, houses, papers and effects against unreasonable searches and seizures, et cetera.

Article V

Protects people against double jeopardy, bearing witness against self, deprivation of life, liberty or property without due process, or taking of private property for public use without compensation, and against trial for capital offense without presentation or indictment by grand jury.

Article VI

Guarantees people right to speedy and public trial by impartial jury of State and district wherein crime was committed, information as to nature and cause of accusations, right to confront witnesses, and to have counsel.

Article VII

Guarantees right to trial by jury in controversy where value exceeds twenty dollars and protects verdicts against re-examination except according to rules of common law.

Article VIII

Prohibits excessive bill or fines and cruel and unusual punishments.

Article IX reads:

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Article X reads:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article III (of the Constitution as Originally Adopted):

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish . . . .

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made,

or which shall be made, under their authority . . . to controversies to which the United States shall be a party, et cetera.

ARTICLE XVIII (AMENDMENT):

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

The authorities cited are:

Hawkes vs. *Smith*, 253 U. S. 221;
Lesser vs. *Garnett*, 258 U. S. 130;
National Prohibition Cases, 252 U. S. 350.

POINT I

THE JUDICIAL POWER INCLUDES THE RIGHT TO REVIEW A PROPOSAL OF CONGRESS THAT A POWER RESERVED TO THE PEOPLE SHALL BE SURRENDERED BY ACT OF STATE LEGISLATURES

1. The Tenth Amendment specifically recognizes two classes of reserved powers:

(a) those reserved to the States
(b) those reserved to the people.

It is submitted that even if Congress so proposed, the people, by convention, would have no right to surrender

or nullify a right reserved to the State as a State, and that the State as a State would have no right to surrender or nullify a right reserved to the people as such, and that this Court would review an error of proposal.

Hawkes vs. *Smith*, 253 U. S. 221, and *Lesser vs. Garnett*, 258 U. S. 130, are thought to be pertinent. In both cases, the people, as a people, sought to disable a State, as a State, from ratifying a Constitutional amendment by act of legislature. The Supreme Court ruled in effect that the function of a State legislature in passing on a proposed amendment to the Federal Constitution, is Federal, and not subject to limitation by the people of the State.

Similarly, and conversely, it is submitted that, if a State constitution were to prohibit the people of such state from ratifying by convention an amendment regularly proposed by Congress for ratification by conventions, and without the consent of the State Legislature, it appears to be self-evident that the Supreme Court would hold that the power of the people to ratify, was a federal process and not subject to limitation by the State Constitution or the State Legislature.

2. Article V of the Constitution provides two alternative methods of ratifying an amendment proposed by Congress:

> (a) by the legislatures of three-fourths of the States.
> (b) by conventions of delegates of the people in three-fourths of the States.

In short, Article V provides a means by which a State, acting as a State, may surrender or nullify a right reserved to it as a State under the Tenth Amendment or otherwise, and Article V likewise provides a method by which the people of a State, acting as a people, through delegates elected to a constitutional convention, may surrender or nullify rights reserved to themselves as people by the Bill of Rights or other parts of the Constitution.

Surely, the existence of clearly defined State's Powers and of equally defined Peoples' Powers reserved under the

Tenth Amendment, and the existence, in Article V, of clearly defined methods by which the States as States or the people as people may surrender or nullify their reserved powers, implies a reason for the existence of such separate and distinct powers of State and people and of such separate and distinct methods of surrendering such reserved State's Powers by the States or such reserved People's Powers by the people. That reason is found in the reservation in the Tenth Amendment of States' Powers to the States and of Peoples' Powers to the people.

Suppose these clear distinctions have been dormant until now? Suppose there is no strong historical basis for these clear demarcations? Nevertheless these groups of States' Powers and of Peoples' Powers in the Constitution and of these alternative methods of surrender by the States or of surrender by the People, constitute inherent and intrinsic evidence, that the makers of the Constitution, and the people who adopted it, had in mind that the peoples' powers should only be surrendered by peoples' conventions and the States' powers by State Legislatures, if the necessity should ever arise.

The Constitution was erected on the self-evident truth that just government depends upon the consent of the governed and a suppositious case is thought to demonstrate the soundness of the present proposition.

Suppose, then, that Congress should propose an amendment, for ratification by the State Legislatures, abolishing the entire Bill of Rights—establishing a State religion, destroying all freedom of speech, press, assembly, and petition of grievances, abridging the right to keep and bear arms, quartering soldiers on the people in time of peace, legalizing unreasonable searches and seizures, abolishing trial by jury and indictments or presentments of grand juries, providing for secret trial and no right of counsel, permitting double and triple jeopardy, abolishing due process of law, legalizing cruel and unusual punishments, etc., etc., . . . —and suppose that the legislatures of three-

fourths of the States should duly ratify such amendment in the manner proposed by Congress, does any rational person suppose that this Court, when the question was raised, would content itself with the citation of *Hawke* v. *Smith*, 253 U. S. 221-226, to establish that "the method of ratification (i. e., by State Legislatures or by constitutional conventions elected by the people) is left to the choice of Congress?"

It is submitted that in any clear case wherein State legislatures endeavored, on election by Congress of that method of ratification, to surrender a true peoples' power, or of Peoples' Convention or a State Constitution endeavoring to surrender or abridge a clear States' power, this Court would enforce the articulated consistency—the dormant common sense—of the Constitution, by holding that the existence of clearly differentiatable peoples' powers and of States' powers in the Constitution and the existence of a method by which the people may surrender peoples' powers, and of an alternative method by which a State may surrender a States' power, imposed a plain, unavoidable and judicially reviewable duty upon congress to propose the States' method of surrendering States' powers and the peoples' method of surrendering peoples' powers, when proposing amendments to the Constitution.

3. If Congress should propose that an amendment which surrendered a reversed power of the States should be ratified by conventions, or that an amendment which surrendered a reserved power of the people of the several States should be ratified by the legislatures of three-fourths of the several States, the Supreme Court has power to refuse to recognize such amendment as valid as a part of the Constitution.

Such judicial veto would throw the matter back for the final determination of the people by a further amendment or ratification, according to the determination of the Supreme Court that either States' or peoples' reserved powers were being proposed for surrender.

POINT II

The 18th Amendment Involves an Attempted Surrender of Sumptuary Powers Reserved to the People and Thus Incapable of Surrender by State Legislatures

The prohibition of the manufacture, sale or transportation of intoxicating liquor for beverage purposes is a surrender or curtailment of a previously existing liberty and power of the people to make, sell and transport liquor just as much as though the Congress and the State Legislatures should by constitutional amendment attempt to deprive women of their power and right to wear corsets or to use high heel shoes.

Every evil result which has flowed from the 18th amendment—the bribery and corruption of public officers, the many murders and assassinations of and by bootleggers and racketeers, the vast profits of the outlawed liquor traffic, the smuggling operations along all our borders, the intense political agitation and hatred of the Constitution in imporant and populous states, the repeal of enforcement acts, the refusal of large numbers of good citizens to recognize the 18th amendment as anything but a political weapon aimed at them not by men who seek to curtail their own habits but merely to condemn habits they never possessed, the general condition of increasing and alarming lawlessness—all these symptoms point indisputably to the fact that the 18th amendment involved a power of the people, the surrender of which power was attempted without their consent and in violation of the Bill of Rights. People would not thus be agitated if mere powers of States as such were affected.

In the long run the rape of popular powers by Congressional and State Legislative action, will do more harm to the Constitution than to the people. If this Court shall exercise its power to insist that no political provisions infringing on the peoples' sovereignty shall be recognized as part of the Constitution unless and until ratified by con-

ventions of the people elected for the purpose, the Constitution will be kept from taking sides in seething controversies of ever increasing intensity. The people will never embalm politics in the Constitution until all the fight has gotten out of the issue to the extent that the people in three-fourths of the states, voting with secret ballots, shall regard the controversy as ended.

Strangers usually get hurt when attempting to mix-up in domestic quarrels and the Congressional error as to the proposal of the 18th Amendment for ratification by public office holders rather than by private citizens voting in secrecy, has gotten the Constitution into a similar predicament by making it attempt to say "peace, peace, when there is no peace."

And there will not be any peace until this usurpation of peoples' powers by public officials in violation of the Tenth Amendment has been defeated.

Every controversial or political provision of the Constitution has resulted in increasing storm, stress and struggle until it has been eliminated. The Revolutionary War ended the tenure of Parliamentary Laws which were backed solely by force. The War Between the States repealed the Constitutional sanctions of Slavery and the Dred Scott decision. The World War was instrumental in bringing to a climax the long struggle to free women from disfranchisement. The political struggles revolving around the 18th Amendment are rapidly assuming alarming proportions and will go to greater excesses if a fanatical minority of office holders in one-fourth of the states shall indefinitely continue to veto all efforts to "repeal" the 18th Amendment.

The remedy for all the evils brought upon the Constitution, the country, the people, the prisons, and this Honorable Court by the controversies raging around the 18th Amendment, is an effective one. It is for this Court to assert its power, right and duty to review and correct the error of Congress in proposing that some fifteen hundred

public officials voting on public roll-call and harassed by small bands of intolerant zealots wielding a balance of power between opposing parties, should surrender or usurp personal rights and powers reserved to more than one hundred million people by the Tenth Amendment.

POINT III

The Ratification of Other Amendments by Public Officials Rather Than by the Delegates of Private Citizens, Is Irrelevant and Immaterial to Points at Issue

This Court has wisely proceeded always on the policy of never deciding issues in advance of events. After a controversy has actually developed, and not until then, does this Court entertain the cause and render its judgment.

There can be no question that ratification of Constitutional amendments by public officials already convened for other purposes is simple, easy and inexpensive in comparison with the cumbersome and strange processes of peoples' conventions called to render verdicts on usually undisputed amendments.

It is confidently asserted that if other amendments proposed for ratification by Legislative action had precipitated violent and constantly enlarging political controversies, this Court would long ago have been called upon to consider whether such manifest symptoms of popular discontent and anger did not point to a usurpation by public officials of powers reserved to the people.

The spectacle of smugglers, bootleggers and bribed officials ardently supporting yet happily violating the 18th Amendment and resisting its appeal, while honorable citizens representing proven majorities in important states are reviling the Constitution, repealing the enforcement acts, and engaging in passive rebellion and nullification, is a sorry one, but is one of which the Court must take judicial notice and it is one which creates a controversy requiring adjudication in the case at bar.

Where every symptom points to violation of the spirit as well as the letter of Article V as construed if not modified by the 10th Amendment by the engrafting of the personal appetite legislation called the 18th Amendment, upon our Constitution, the duty of the Court to review the method of ratification of the 18th Amendment should not be affected in any way by the fact that other amendments, some perhaps involving peoples' powers but not necessarily any surrender or curtailment thereof, have been similarly ratified without thereafter being brought into judicial question as the outcome of what in effect is a passive rebellion in many of our great states.

CONCLUSION

The Conclusion submitted is, that States' Reserved Powers may not be surrendered by the people; that Peoples' Reserved Powers may not be surrendered by State Legislatures; that a proposal by Congress that a Peoples' Power shall be surrendered by legislative ratification is not final but is subject to review by the Supreme Court in determining the validity of such so-called amendment; that the Eighteenth Amendment is an attempted surrender or nullification of a Peoples' Power by States acting as States, and therefore is not a valid and lawful amendment; and that this Court has a duty in upholding and defending the Constitution, to review and rectify the error of Congress in dealing with a Peoples' Power, bearing constantly in mind that our Constitution was born in the blood of the Revolutionary War; that it was baptized in the blood of the War between the States; that the lives of enforcement officers and violators alike are now being lost in increasing volume throughout this nation and along all its borders in the name of the Eighteenth Amendment so-called; that the Dred Scott decision and the War of 1861-65 show that even the final judgment of the Supreme Court cannot act as a fiat when the Constitution and the liberties of men are in the maelstrom of politics and threatened rebellion; and finally

that the Eighteenth Amendment, instead of being accepted and obeyed and preserved and respected in the hearts of the people as a duly enacted and valid Constitutional rule, is becoming more and more a subject of violent political and police struggle.

A law is never a law, no matter how majestic the mode of its alleged adoption (and the Eighteenth Amendment was conceived in the hysteria of war), until the passions and the politics and the resistance and the dangerously disruptive powers of vast numbers of our otherwise law abiding citizens have finally become calmed and they have acquiesced in and accepted the new law and determined to obey it as a self-imposed habit and civic duty rather than under threat of force.

The test of a law is its ability to establish order, to promote domestic tranquility and to secure the blessings of liberty and peace to ourselves and our posterity.

By these tests, the Eighteenth Amendment stands condemned. Millions of otherwise good citizens violate it as a conscientious duty in a political contest in which only increasing resistance can prevent the loss of rights and liberties reserved and guaranteed to them by their Constitution and never surrendered by them or with their consent.

The judgment of the court below should be sustained.

Respectfully submitted,

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No. 608

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Defendants-Appellees.

BRIEF IN SUPPORT OF JUDGMENT

HENRY W. JESSUP,
AUSTEN G. FOX,
Amici Curiae.

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INDEX.

PAGE

The Fifth Article of the Constitution contemplated from the beginning two different kinds of amendment and therefore two modes of ratification..... 1

The discretion concededly reposed in Congress by Article V is thus a judicial discretion; it has two modes of ratification to choose from; but it must choose the one appropriate to the nature of the amendment promulgated by it..... 1

This intent of the Fifth Article appears from the history of the framing of the Constitution..... 2

The fundamental purpose of the men in the Philadelphia Convention was to safeguard their liberties by putting every right and power of the people not delegated or surrendered beyond the reach of the governments..... 3

The dual governmental nature of the new government included:

(1) Some of the personal rights just wrested, sword in hand, from the control of the Crown had to be re-subordinated to the control of the new Federal Government.. 4

(2) So, also, some of the governmental powers possessed by the Colonies or States as successors of the Crown had to be surrendered by them to and be bestowed upon the new Federal Government, so that it could function nationally and internationally..... 4

The absence of a Bill of Rights in the original draft led to ratification with reservations or conditions.. 4

PAGE

When the Bill of Rights was drafted by the First Congress, the conditional nature of these ratifications was recognized in the resolutions submitting the proposed twelve amendments..... 5

Our contention is, then, that Article V contemplated by its express language:

(A) That if an amendment were to be proposed, giving to the Federal Government any more governmental powers, they would have to be subtracted from the residuum of such powers not originally delegated by the States or Colonies, and hence must be ratified by a given vote of the legislatures of the States, as custodians or possessors of such residuum of governmental powers. 5

(B) *But and if* it were proposed by a new amendment to subject individual rights (not originally subordinated to Federal control) to the regulation or control of the new Federal Government, then the consent of the people, who had never theretofore relinquished those rights, must be secured, in the alternate manner prescribed by Article V..... 5

The Tenth Amendment did not create this differentiation. It merely copper-fastened it by the safeguard of explicit reservation..... 6

The Eighteenth Amendment patently assumes to subtract from rights reserved to the people. However selfish, however petty any such right, it is sacred and safeguarded, though it fall in the *de minimis* class..... 7

The people of the United States never delegated to any or all State legislatures the power to subordinate to Federal control any of the rights reserved to the people by the United States Constitution... 8

PAGE

The people of the United States is an entity and aggregately different from and greater than the mere combined citizens of the several States..... 8

We contend further that since the discretion of Congress under Article V in selecting the mode of ratification is a judicial discretion, it is reviewable in this Court, which is not foreclosed by its previous decisions in the so-called "Prohibition Cases"..... 10

In interpreting Article V, this Court will recall its previous decision in *Scott* v. *Sandford*, 19 How. 393, that the Constitution speaks not only in the same words *but with the same meaning and intent* with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States..... 14

TABLE OF CASES, ETC.

PAGE

Cooley, Constitutional Limitations (7th Ed., 1903) .. 8

Documentary History of the Constitution (1894) 5

Elliott's Debates:
Vol. 2. .....9, 12, 13
Vol. 3. .....11, 14
Vol. 5. 4

Federalist, The:
No. 45 14
No. 48 ..... 2, 8
No. 49 9
No. 85 7

Formation of the United States, House Document 398 (1927) 4, 14

Hennessy, Citizen or Subject..... 13

Jessup, The Bill of Rights and its Destruction by Alleged Due Process of Law.....3, 4, 5, 11

Marbury v. Madison, 1 Cranch 137..... 6

Mattox v. United States, 156 U. S. 237..... 2

Meigs, Growth of the Constitution..... 4

Rives, Life and Times of Madison.....3, 11

Scott v. Sandford, 19 How. 393, 426..... 14

Smith v. Loughman, 245 N. Y. 486, 497..... 12

Turner v. Williams, 194 U. S. 279..... 2, 9

United States of America v. Thibault, C. C. A., 2nd Cir. (not yet reported)..... 10

Supreme Court of the United States

UNITED STATES OF AMERICA,
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WILLIAM H. SPRAGUE and
WILLIAM J. HOWEY,
Defendants-Appellees.

BRIEF OF HENRY W. JESSUP AND AUSTEN G. FOX SUBMITTED AS *AMICI CURIAE*.

This brief rests upon the historic and logical basis that the Fifth Article of the Constitution contemplated from the beginning two different kinds of amendment (and, therefore, two modes of ratification)—the one intended to be ratified by legislatures, the other only by the People themselves; also that the Eighteenth Amendment is the first of those propounded since the date of ratification which belongs to the second class, and that the Congress, in sending it out for ratification, inadvertently and as a matter of course, followed what the Court below styled the "traditional method" or uniform precedent in directing the mode of ratification by the Legislatures, **thus defeating its validity as against The People.**

This "traditional method" had been acquiesced in for generations; for the reason, as we view it, that it was appropriate to the previous amendments.

In other words, that the discretion concededly reposed in Congress by Article V is a judicial discretion. It has two modes of ratification to choose from; **but it must select the one appropriate to the nature of the amendment promulgated by it.**

This intent of the Fifth Article appears from the history of the framing of the entire Constitution. During those long debates, one fact stands out. The participants were men who themselves, in outstanding ways and eminent degree, had sacrificed and fought in the War of the Revolution—for what? For personal rights and liberties! For the rights, as Mr. Justice Brown says, *Mattox* v. *U. S.*, 156 U. S. 237, which each "already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta." And as Mr. Wm. D. Guthrie has put it: "First and foremost among the cardinal principles of Magna Charta was the idea that the individual had *natural rights as against the King.*" They fought for liberty as individuals. If the rights they were asserting had been conceded by the Crown, they would have laid down their arms. As it was, they won independence and went to the Convention in victorious possession of "rights and liberties."

Madison quotes a statement by Jefferson in the Federalist No. 48 that "*an elective despotism was not the government we fought for.*" If the contention of the Government be sustained in this case, then the rights and liberties of the People of the United States are, at any time, in the discretion of the number of men who constitute a given Congress, at the mercy and discretion of an "elective despotism" consisting of a majority of 7,500 state legislators; yet, it has never been demonstrated by law or by history that these legislators have, at any time, had committed to them, as agents or even in trust, the right to consent to the impairment of the personal "rights and liberties" safeguarded by the Constitution or to subordinate any of the residue of personal rights reserved by the People in the Bill of Rights to the control of the Federal Government.

This Court, *Turner* v. *Williams*, 194 U. S. 279, page 296, said: "The powers the people have given to the general government are named in the Constitution and all not there named, either expressly or by implication, are

reserved by the People and can be exercised only by them or *on further grant from them.*" Does the Government, in this case, claim that Article V constitutes a grant absolute and unrestricted to the Congress to propose to the State Legislatures the elimination of any one of the first Ten Amendments? Yet that is the only reasonable conclusion to be drawn from the argument that the Congress has a discretion unlimited, unhampered by the nature of the proposed amendment, and unreviewable in the Courts.

These rights and liberties the men in the Philadelphia Convention were engaged in safeguarding in the preparation of the new Constitution, endeavoring to put "every right and power of the people not delegated or surrendered, * * * *beyond the reach of the Governments*" (II Rives' *Madison*, 38-46)—warned, as they had been, by the futilities and inefficiencies of the Articles of Confederation. As was recently asserted, "the men of 1787-9 had great confidence in The People, but rather a poor opinion of legislators."

So every word of this great document was a battlefield and every phrase a campaign—and the longest campaign of all was as to whether a Bill of Rights should be incorporated therein, for it lasted through and beyond the debates on ratification in the thirteen Colonial or State Conventions (see Jessup, *The Bill of Rights and its Destruction by Alleged Due Process of Law*, Callaghan & Co., 1927, pp. 47 *et seq.*).

We respectfully ask the Court, in considering the point raised in this brief, to seek to recapture the spirit of the pioneers of our Government and instead of looking backward merely upon decisions of this and other courts, to look forward to what the framers of the Constitution contemplated both in their desire to form a stable government and in their fears of what this new super-government might do, and, in that connection, to recall that the Constitution was based upon the Declaration of Independence and that the Preamble was ever present in the minds of

those who took part in the debates in the First Constitutional Convention.

Hence it is respectfully submitted that when the framers of the Constitution focussed their work on *future amendment* of the document, they confronted dual governmental functions in the chart which was to guide the new super-government—for the new United States was to operate downward *in two directions:*

> (1) Some of the personal rights just wrested sword in hand from the control of the Crown had to be *re-subordinated to the control* of the new Federal Government;
>
> (2) So, also, some of the governmental powers possessed by the Colonies or States as successors of the Crown had *to be surrendered by them* to and be bestowed upon the new Federal Government, so that it could function nationally and internationally.

Accordingly, in the first Constitutional Convention when the need to incorporate in the Constitution a bill of rights was urged, the answer was: "This is to be a government of delegated powers only. What is not given will not be possessed." This led to a tie vote (Meigs, *Growth of the Constitution*, 314; V Elliott, *Debates*, 538), and ultimately to the "gentleman's agreement" or "tacit understanding," as Taylor calls it, fulfilled by the first Congress on the motion of James Madison (see Jessup, *Bill of Rights, etc., supra*, pp. 47 *et seq.*).

The result was partial and in some cases conditional ratification (see Jessup, *Bill of Rights, etc., supra*, pp. 28-29; also text of ratifications, *Formation of the Union*, House Document No. 398, 1927, pp. 1009 *et seq.*, showing that seven States ratified with reservations as to Bill of Rights, and Massachusetts in effect *conditionally*, p. 1018), and the first ten amendments were framed and adopted on motion of Mr. Madison, in the first Congress, as such

a Bill of Rights, to allay the fears and suspicions of those who thought they might have leaped from the frying pan of King George into the fire of a Frankenstein monster of experimental government (see Jessup, *Bill of Rights, etc., supra*, p. 47). See also resolution of First Congress submitting first twelve amendments to the Constitution (II *Documentary History Constitution* [1894], 221 *et seq.*), which begins:

> "The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to *prevent misconstruction* or *abuse* of its powers, that *further declaratory and restrictive* clauses should be added, * * *."

These amendments, being declaratory *and* restrictive of the powers of government, were, under Article V, proposed for ratification "to the legislatures of the several States" (*id.*). The first and second amendments then proposed failed of ratification.

The conclusion is then that Article V contemplated by its express language:

> **A. That if an amendment were to be proposed, giving to the Federal Government any more governmental powers, they would have to be subtracted from the residuum of such powers not originally delegated by the States or Colonies, and hence must be ratified by a given vote of the Legislatures of the States, as custodians or possessors of such residuum of governmental powers.**
>
> **B. But and if it were proposed by a new amendment to subject individual rights (not originally subordinated to Federal control) to the regulation or control of the new Federal Government, then the consent of the People, who had never theretofore relinquished those rights, must be secured, in the alternate manner prescribed by Article V.**

We assert that this differentiation of mode of ratification was deliberate—for every word of the great document was deliberate.

The Supreme Court has held that in construing the Constitution, effect must be given to every clause. No construction can be adopted which treats any provision of the instrument as mere surplusage. The framers had a purpose and an end in view in adopting each clause; and that construction must be adopted which gives effect to each clause.

On this subject of constitutional construction, Chief Justice Marshall said:

> "It cannot be presumed that any clause in the Constitution is intended to be without effect, and a construction which would lead to such a result is inadmissible, unless the words require it."
>
> *Marbury* v. *Madison*, 1 Cranch (U. S.) 137, 174; 2 L. Ed. 60, 72.

Why did the framers, more intent on limiting the new Congress than on empowering it, formulate and insert this differentiation if not to cover the alternate kinds of amendment that might in the uncertain future be put forward.

The Tenth Amendment did not create this differentiation. It merely copper-fastened it by the safeguard of explicit reservation. The words "to the States *or* to the People" meant the same as the differentiation in Article V as to how the new power or control was to be achieved by the Federal Government. It was the reassurance *demanded* in the "reservations" of seven ratifying conventions, *promised* by the "gentleman's agreement," *confirmed* by Mr. Madison in his opening speech in the first Congress, and constantly *kept in mind* during the debates on the text of the Bill of Rights, *i.e.*, the first ten amendments.

Is it likely that the men of 1787, distrustful of "legislators," should have intended to leave the rights "reserved

to the People," which they themselves had won and were then engaged in safeguarding, to the tender mercies of "the governments," *i.e.*, of any given Congress and of a majority of our 7500 State legislators?

We submit this brief, lest the [redacted]stress laid in the argument below upon the Tenth Amendment should obscure the constitutional issue otherwise so explicitly presented to this Court.

It will readily be seen that if this contention as to the discretion of the Congress be true, the amendments other than the Eighteenth Amendment were properly submitted to the Legislatures, because they fall under the first class A, *supra*. Even the Fourteenth Amendment, which seems to deal with "rights" of the people of the United States, was not of the second class B, for it was in substance and effect a further safeguard to those rights against what Rives calls "the governments," in that it protected every citizen of the United States against arbitrary encroachment in Federal or State courts upon his rights, and, therefore, it was proper to submit it to the Legislatures and not to "the People."

But the Eighteenth Amendment patently assumes to subtract from rights reserved to "the People." However selfish, however petty any such right, it is sacred and safeguarded by the Tenth Amendment though it fall in the *de minimis* class. It would be lamentable if it were to be supposed that the Tenth Amendment was intended to prevent ratification of *any* future amendment by the Legislatures. It left Article V unchanged with its dichotomy of *purpose* and of *mode of ratification*.

In *Federalist* 85, Alexander Hamilton says:

> "For my own part I acknowledge a thorough conviction that any amendments which may, upon mature consideration, be thought useful will be *applicable to the organization of the government, not to the mass of its powers.*"

Here a distinction is drawn between an amendment dealing only with the organization of the Federal Government and one adding to the mass of its powers. Evidently is was a realization of differences in the nature of proposed amendments that caused the framers to provide the two modes of ratification.

James Madison, in *Federalist* No. 48, third paragraph, said:

> "As the people are the only legitimate fountain of power, and it is from them that the Constitutional Charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to *recur to the same original authority* * * * *whenever it may be necessary to enlarge, diminish, or new-model the powers of the government.*"

Any other construction would be to assume that our forefathers, instead of seeking to carry out the purposes declared in the Declaration of Independence and in the Preamble to the Constitution, were actually conferring upon what Rives calls "the governments" the very powers that they had successfully denied to Parliament and King combined.

We submit, additionally, that nowhere in our State Constitutions nor in our political history is there evidence that the People of the United States (*which is an aggregate greater than the mere combined citizens of the States*) ever delegated to any or all State Legislatures the power to subordinate to Federal control any of thesrights reserved to "the People" by the United States Constitution.

In Cooley on *Constitutional Limitations* (7th Ed., 1903, at p. 61), the author writes:

> "It is obviously impossible for the whole people to meet, prepare and discuss the proposed alterations, and there seems to be no feasable mode by which an expression of *their* will can be obtained, except by asking it upon the single point of assent, or disapproval. But no body of representatives,

> unless specially clothed with power *for that purpose by the people* when choosing them, can rightfully take definitive action upon amendments, or revisions; they must submit the result of their deliberations to the people—who, alone, are competent to exercise the powers of sovereignty in framing the fundamental law for ratification or rejection."

This doctrine received the approval of this Court in 1907.

> "The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised by them, or upon further grant from them."
>
> *Turner* v. *Williams*, 194 U. S. 279, per Mr. Justice Brewer.

Once again, follow Hamilton, in the New York Convention, this time with reference to the unfitness of State Legislatures of the day to be trusted with the power to insert into the Constitution, or, equally, to remove therefrom any of its parts. "Look at their history." "What frictions have arisen from the most trifling causes? What intrigues have been practised for the most illiberal purposes? Is not the State of Rhode Island, at this moment, struggling under difficulties and distresses, for having been led blindly by the spirit of the multitude? What is her legislature, but the picture of a *mob* (in original) * * * Let us beware that we *do not make the state legislatures a vehicle in which the evil humors may be conveyed into the national system!*" (2 Ell. *Deb.* 317).

On Tuesday, February 5, 1788, the *Federalist* No. 49 contained the following:

> "As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems

> strictly consonant to the republican theory to recur to the same original authority"—a direct reference to the "conventions" of the Seventh and Fifth Articles—"whenever it may be necessary to enlarge, diminish, or new-model the powers of government."

The discretion of Congress in selecting the mode of ratification is thus reviewable in this Court. Nor is this Court foreclosed by its previous decisions in so-called Prohibition cases, from re-examination of the validity of the Eighteenth Amendment.

It is commonly reported that on the argument of the "Prohibition Cases," a question was put from the Bench while the counsel for Rhode Island was arguing: "Was there no method then by which an amendment such as the XVIIIth could have been validly adopted?"—to which counsel is said to have replied, "No"; and in the decision of the Circuit Court of Appeals for the Second Circuit, in the case of *United States of America, Appellee*, v. *Louis E. Thibault, Appellant*, the Court, in its opinion, assumes that the question presented by this brief was, previously in the National Prohibition Cases, raised in this Court in the brief of the Hon. Elihu Root in his argument that "if the power of amendment vested in Congress and thirty-six of the State Legislatures be absolute and unrestricted, then there would be no limitation whatever upon their legislative authority."

It is respectfully submitted that the question presented and argued by Mr. Root did not explicitly raise this question of the double nature of the Fifth Article of the Constitution or the question that the discretion of Congress was a judicial discretion and that while it could select the mode of ratification, it was bound to select, according to the intent or tenor of Article V, the mode appropriate to the nature of the amendment propounded for ratification. For, if an amendment be *properly* proposed to be ratified by the Legislatures, then their power would be "absolute and unrestricted." If not *properly* so proposed, then the

ratification is futile. What other sense or purpose can otherwise be read into or inferred from Article V? (see Jessup, *Bill of Rights*, *supra*, p. 69).

The assertion by Mr. Rives in his "Life and Times of Madison," quoted above, finds its justification in the reports of the Thirteen Conventions called to consider the ratification of the Constitution, even more than in the debates at the Philadelphia Convention itself. We refer to the statement that it was the determination of the Founders to put the rights or liberties that they had won "beyond the reach of the governments," which means not only the new United States Government but the Governments of the respective colonies or states. The New Government was intended to be a national government, in contrast to the confederation which was a Federal Government. This was pointed out in the Virginia Convention by Mr. Madison, who contrasted the existing system, which, he said, "has been derived from the dependent derivative authority of legislatures of the states, whereas this (meaning the proposed new national government) is derived from the superior power of the people"; and, he added: "if we look at the manner in which alterations are to be made, the same idea is, in some degree, attended to" (3 Ell. Deb. 94).

In the North Carolina Convention, Maclaine spoke as follows: "It may be justly said that it (meaning the Constitution) diminishes the power of the State Legislatures." Does not this exclude the possibility that he supposed that the Constitution clothed a combination of three-quarters of the State Legislatures with an omnipotent power of writing in *or writing out* of the Constitution, including the Bill of Rights, rights for which the People of the United States had fought the British King and Parliament?

In another place, Madison said: "If the 'conventions' ratify the Constitution, it will be a government established not through the intervention of the legislatures but by the people at large."

In the Pennsylvania Convention, James Wilson spoke to the same effect (2 Ell. Deb. 443).

We make no apology for this appeal to this Court to take judicial notice of the facts of history. A great Judge of the New York Court of Appeals said, years ago: "We appeal to history and not to logic for the explanation."

We venture to paraphrase the trenchant words of another Judge, Cardozo, Ch. J., in *Smith* v. *Loughman*, 245 N. Y. 497: **"If this statute be upheld, there is set in it (our Constitution) an entering wedge that may be the beginning of its destruction."**

Respectfully submitted,

AUSTEN G. FOX,
HENRY W. JESSUP,
Amici Curiae,
Bar Building,
New York City.

NOTES.

A. Conventions.

The brief for the United States, at page 17, quotes Gerry in the First Congress. It omits to add that he had strenuously opposed that clause in Article V adopted in the Philadelphia Convention, whose nearly last act was to vote down, 10 to 1, his motion to strike out from Article V the words "or by conventions in three-fourths thereof" (Hennessy, *Citizen or Subject*, p. 134).

Why not have quoted what Wilson said?—"Upon what principle is it contended that the sovereign power resides in the State governments? * * * The proposed system starts out with a declaration that its existence depends upon the supreme authority of the people alone" (2 Ell. Deb. 443). Or what Daniel Webster said in 1830, in his reply to Haynes?—"If any construction be established * * * so as to become practically a part of the Constitution, they (the people) will amend it at their own sovereign pleasure. But while the people choose to maintain it as it is, while they are satisfied with it and refuse to change it, *who has given to the State legislatures* a right to alter it either by interference, construction or *otherwise?*" (Italics ours.) And he continued: "The people have not trusted their safety, in regard to the general construction, to their hands. They have required other security and taken other bonds."

B. Rights and Liberties.

In his book, *Citizen or Subject* (Dutton & Co., 1923), Mr. Francis X. Hennessy, the author, has collated, from the *Federalist*, from Elliott's *Debates*, and from the decisions of this Court, the contemporary declarations and arguments used by the men whose "*primary object in framing this Constitution was to preserve the rights for which they had fought and in fighting for which they had achieved independence.*"

We call special attention to the "Eleventh" chapter, in which he pointed out that "whatever the Fifth Article meant to those who made it, it means to-day (see *Scott* v. *Sandford*, 19 How. 393, page 426). Referring to the Constitution, this Court said: '*It speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States.*'"

In 3 Elliott's *Debates*, 446, Patrick Henry's argument before the Virginia Convention is quoted from, in which he pointed out "that one-twentieth part of the American people, a trifling minority, may reject the most salutary amendments, *if* the powers contemplated could be exercised effectually, not by the people of the United States, *but by State legislatures.*"

The argument in this chapter of Mr. Hennessy's book is an attack upon the theory upon which the Government seems to rest in these "Prohibition Cases," that the Fifth Article of the Constitution constituted a *grant* of power to what Rives calls "the governments," whether State or Federal.

Madison, the drafter of the Fifth Article, explicitly declared that if the sovereignty of the States could not be reconciled to the happiness of the people, "let the former be sacrificed to the latter" (*Federalist* No. 45).

C. Bill of Rights.

We have called the first ten amendments a "Bill of Rights." The documents sent to the First Congress, by way of ratifications, in effect so defined the accompanying reservations. See *Formation of the Union*, *supra*; Massachusetts, p. 1018; South Carolina, p. 1023; New Hampshire, p. 1025; Virginia (expressly), p. 1028; New York, p. 1035; North Carolina (expressly), p. 1044; Rhode Island (expressly), p. 1052. And see Abraham Lincoln's letter to Alexander H. Stephens, January 19, 1860: "The first ten amendments are the Bill of Rights."

D. Right Thing in the Wrong Way.

A situation similar to that of to-day existed at the time of Abraham Lincoln's inaugural, the "moral" sense of the people being, however, otherwise aligned. He said: "The fugitive-slave clause of the Constitution, and the law for the suppression of the foreign slave trade, are each as well enforced, perhaps, *as any law can ever be* in a community where the moral sense of the people *imperfectly supports the law itself.*"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 606.

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Defendants-Appellees.

BRIEF FILED IN SUPPORT OF THE JUDGMENT BY ELIOT TUCKERMAN (AS *AMICUS CURIAE*).

ELIOT TUCKERMAN
(As *Amicus Curiae*).

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SUBJECT INDEX.

	PAGE
Congress did not have power to propose the XVIII Amendment by affirmative votes of 282 in the House and 47 in the Senate	2
The Question is Justiciable	2
Joint Resolution of N. Y. Legislature calling for the votes in Congress	3
Certificates of the clerks of Congress	4
The rule of *stare decisis* does not apply	9
Letter of Gouverneur Morris	11
Letter of Madison showing Morris was Draftsman	13
Letter of Morris claiming draftsmanship	14
Amendment contrasted with Revolution, Curtis	15
The Prohibition Cases should be reversed	19
History of the Amendments	21
The First Ten Amendments	22
Washington's First Inaugural Address	22
Outlook of the Country in 1789	23
The Journals of the First Congress	26
The Eleventh Amendment	34
The Twelfth Amendment	35
Character and point of view of Gouverneur Morris	37
Was usurpation transformed into precedent?	41
Speaker Reed's Rule	42
The Thirteenth and Subsequent Amendments	44
The Eighteenth Amendment	45
The Constitution	45
The Judgment appealed from should be affirmed	47
Appendix: Extracts from the Journal of the House of Representatives in the First Congress	48

Table of Citations.

PAGES

Annals of the First Congress, First Edition.....
25, 26, 28, 29, 30
Annals of the Third Congress..... 34
Annals of the Eighth Congress..... 37

Constitution, Article VI..... 11
Channing, History of the U. S..... 24

Elliot's Debates..... 25, 39

Hinds' Precedents of the House of Representatives..9, 26, 42
History of the Constitution, G. T. Curtis.....15, 39, 41

Johnston's American Politics..... 36
John Adams's Works..... 40

Letters of a Land Owner, Oliver Ellsworth..... 40
Life & Correspondence of Rufus King..... 40
Life of Gouverneur Morris.....11, 13, 14, 37, 38, 46
Lincoln's First Inaugural Address..... 10

Madison's Letters..... 32
Missouri Pacific Ry. Co. *v.* Kansas, 248 U. S.....
10, 15, 20, 21, 27, 32, 35, 40, 41, 43, 44

National Prohibition Cases, 253 U. S.....10, 19, 29
N. Y. Assembly Journal, 1918.....2, 3, 9, 21, 45

Pollock *v.* Farmers Loan & Trust Co., 157 U. S..... 10

Story's Commentaries on the Constitution..... 46

U. S. House of Representative's Journal, First Session, First Edition.....27, Appendix 48
U. S. House Journal, Third Congress..... 34
U. S. Senate Journal, First Session, First Edition....
23, 27, 30, 31, 33, 34, 46
U. S. Senate Journal, Third Congress..... 34

Washington's First Inaugural Address..... 22

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The rehearing of the question of the interpretation of Article V of the Constitution of the United States, raised by the appellees in this suit, presents an issue of such paramount importance to all the people of this country that the undersigned has asked and received leave to file this brief, as *amicus curiae*, in the public interest.

The immediate question presented by the appeal is whether the Eighteenth Amendment to the Constitution, so-called, was ratified in accordance with the provisions of the Constitution, as amended. The appellant's contention is that, if the Eighteenth Amendment was so ratified the indictment should not have been quashed.

This brief is submitted in support of the judgment appealed from on the theory that, whether its ratification was or was not in accordance with the provisions of the Constitution, as originally adopted or as amended, the Congress acted without power in proposing the so-called Eighteenth Amendment, which is, for that reason, void.

Congress did not have power to propose the Eighteenth Amendment upon the affirmative vote of 282 members of the House of Representatives, and 47 Senators.

The Question Is Justiciable.

The Legislature of the State of New York, on convening on January 2, 1918, received a communication from the Governor of the State transmitting a Joint Resolution of Congress proposing an amendment to the Constitution of the United States (now known as the Eighteenth Amendment) purporting to have passed "two-thirds of each house concurring therein". *N. Y. Assembly Journal, 114th Session, 1918, Vol. 1, p. 18.*

Formal objection to the proposed amendment was made in the Assembly on March 6, 1918, because the requirement of Article V of the Constitution of the United States, that two-thirds of both Houses, of the Congress shall deem the same necessary, was not complied with. *N. Y. Assembly Journal, 1918, Vol. 1, p. 575.*

The Speaker thereupon ruled that the question of the construction of that article of the Constitution of the United States would probably have to be passed upon by the Supreme Court.

The Legislature of the State of New York, on March 7, 1918, passed the following Joint Resolution of the Senate and Assembly:

"Whereas, Article V of the Constitution of the United States provides that the Congress whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to the Constitution; and

Whereas, the Governor of the State of New York on January 2, 1918, transmitted to the Legislature a copy of a Joint Resolution of the Congress proposing an Amendment to the Constitution of the United States; and,

Whereas, a question has been raised in this Assembly as to whether the foregoing provision of Article V of the Constitution of the United States was complied with, and whether the above-mentioned Joint Resolution is lawfully before the Legislature of this State; therefore be it

Resolved (if the Senate concur), that the Clerk of this Assembly be directed to request the Clerk of the United States Senate and the Clerk of the House of Representatives to transmit to him for the information of the Legislature of this State duly certified copies of the Roll Calls of the Senate and of the House of Representatives respectively, upon the passage of said Joint Resolution, and that upon receipt thereof he forthwith inform this Assembly thereof."

N. Y. Assembly Journal, 1918, Vol. 1, pp. 634-5, 641.

The Secretary of the United States Senate and the Clerk of the House of Representatives, complying with this request, transmitted to the New York Assembly duly certified documents setting forth the votes and roll calls on which the Joint Resolution was declared passed, as follows:

UNITED STATES SENATE—OFFICE OF THE SECRETARY

JAMES M. BAKER,
Secretary.

I, James M. Baker, Secretary of the Senate of the United States of America, do hereby certify that the hereto attached sheets, numbered 1 and 2 are true and correct copies of extracts from the Journal of the Senate of the United States of America relating to the passage of Senate Joint Resolution 17, 65th Congress, proposing an amendment to the Constitution of the United States.

In testimony whereof I hereunto subscribe my name and affix the seal of the Senate of the United States of America, this ninth day of March, A. D., 1918.

JAMES M. BAKER,
Secretary of the Senate of the United States.

EXTRACT FROM THE JOURNAL OF THE UNITED STATES SENATE.

(The following extract from the Journal of the United States Senate for the Legislative Day of July 31, 1917, Calendar Day of August 1, 1917, relates to the passage of the Joint Resolution (S. J. Res. 17) proposing an amendment to the Constitution of the United States and commonly known as the National Prohibition Amendment.)

No further amendment being proposed.

Ordered, that the resolution be engrossed and read a third time.

The said resolution was read the third time.

On the question, Shall the resolution pass?

It was determined in the affirmative (Yeas, 65; Nays, 20).

Those who voted in the affirmative were: Messrs. Ashurst, Bankhead, Beckham, Borah, Brady, Chamberlain,

Colt, Cummins, Curtis, Fernald, Fletcher, Frelinghuysen, Gore, Gronna, Hale, Harding, Hollis, Johnson of California, Jones of New Mexico, Jones of Washington, Kellogg, Kendrick, Kenyon, King, Kirby, Knox, LaFollette, McCumber, McKellar, McNary, Martin, Myers, Nelson, Newlands, Norris, Overman, Owen, Page, Pittman, Poindexter, Ransdell, Robinson, Saulsbury, Shaforoth, Sheppard, Sherman, Shields, Simmons, Smith of Arizona, Smith of Georgia, Smith of Michigan, Smith of South Carolina, Smoot, Sterling, Stone, Sutherland, Swanson, Thompson, Trammell, Vardaman, Walsh, Watson, Williams and Wolcott.

Those who voted in the negative were: Messrs. Brandegee, Broussard, Calder, Culberson, France, Gerry, Hardwick, Hitchcock, Husting, James, Lewis, Lodge, Penrose, Phelan, Pomerene, Reed, Underwood, Wadsworth, Warren and Weeks.

So it was,

Resolved, That the resolution pass, two-thirds of the Senators present having voted therefor.

Ordered, That the Secretary request the concurrence of the House of Representatives therein.

(The Senate concurrence to the House amendments to the Joint Resolution.)

Tuesday, December 18, 1917.

National Prohibition Amendment.

The Vice President laid before the Senate the amendments yesterday received from the House of Representatives for concurrence to the joint resolution (S. J. Res. 17) proposing an amendment to the Constitution of the United States.

Mr. Gallinger raised a question as to the presence of a quorum:

Whereupon,

The Vice-President directed the roll to be called; when sixty-nine senators answer to their names, a quorum being present,

On motion of Mr. Sheppard, that the Senate agree to the amendments of the House of Representatives,

On a division of the Senate the yeas were 47 and the nays were 8.

So it was,

Resolved, That the Senate agree thereto, two-thirds of the Senators present having voted therefor.

Ordered, That the Secretary notify the House of Representatives thereof.

[COPY.]

SOUTH TRIMBLE,
Clerk.

HOUSE OF REPRESENTATIVES,
CLERK'S OFFICE,
WASHINGTON, D. C.

I, South Trimble, Clerk of the House of Representatives, of the United States of America, hereby certify that the following is an extract from the original journal of the House of Representatives, of the proceedings, had and done on the seventeenth day of December, nineteen hundred and seventeen; to-wit:

"The question being, upon the consideration of Senate Joint Resolution, No. Seventeen, submitting an amendment to the Constitution.

"The question being on agreeing to the joint resolution as amended and being taken, the yeas and nays being demanded and ordered by one-fifth of the members present,

"Those who voted in the affirmative are—

Adamson Alexander Almon Anderson Anthony Ashbrook Aswell Austin Ayres Baer Blankhead Barkley Barnhart Beakes Bell Beshlin Black Bland Booher Borland Bowers Brand Brodbeck Browning Broumbaugh Burnett Burroughs Butler Byrnes S. C. Bryns, Tenn. Campbell, Kans. Chandler Miss Cannon Caraway Carlin Carter Mass.

Carter, Okla. Clark Fla. Claypool Collier Connally, Tex. Connelly, Kans. Cooper, Ohio Cooper, W Va Cooper Wis Copley Costello Cox Cramton Crisp Currie, Mich. Dale, Vt. Dallinger Darrow Decker Dempsey Denison Denton Dickinson, Dill Dillon Dixon Doolittle Doughton Dowell Drane Dunn Elliott Ellsworth Elston Emerson Esch Evans Fairfield Farr Ferris Fess Fields Fisher Flood Focht Fordney Foss Foster Frear French Fuller Ill Fuller, Mass. Gandy, Garrett, Tenn Garrett, Tex Glass Goodwin N. C. Good Goodall Gould Graham, Ill Green, Iowa Gregg Griest Hadley Hamilton, Mich Hamilton, N. Y. Hamlin Harrison, Miss Harrison, Va Hastings Haugen Hawley Hayden Helm Helvering Hensley Hersey Hicks Hilliard Holland, Hollingsworth Hood Houston Howard Hull, Tenn Humphreys Hutchinson Ireland Jacoway James Johnson, Ky Johnson S Dak. Johnson, Wash. Jones Tex. Jones, Va. Kearns Keating Kehoe Kelley, Mich, Kelly, Pa. Kennedy, Iowa Kettner Kiess, Pa. Kincheloe King Kincaid Kitchin Knutson Kraus Kreider LaFollette Langley Larsen Lee Ga. Lenroot Lever Little Littlepage Lobeck Lundeen Lunn McClintic McCormick McCulloch McFadden McKenzie McKeown McKinley McLaughlin, Mich Mapes Mays Miller, Minn. Mondell Montague Moon Moores, Ind. Morgan Mott Nelson Nicholls, S. C. Norton Oldfield Oliver, Ala Olney Osborne Overstreet Padgett Paige Park Parker, N. Y. Peters Platt Polk Powers Pratt Price Purnell Quin Ragsdale Rainey Raker Ramseyer Randall Rankin Rayburn Reavis Reed Robbins Robinson Romjue Rose Rowe Rowland Ruley Rucker Russell Sanders, Ind. Sanders, La. Saunders N. Y. Saunders, Va Schall Scott, Iowa Scott, Mich Sears Sells Shackleford Shallenberger Shouse Sims Sinnott Sisson Slemp Sloan Smith, Idaho Smith, Mich. Snell Snook Steagall Stedman Steenerson Stephens, Miss Sterling, Ill. Sterling Pa. Stevenson Stiness Strong Sumners Sweet Switzer Taylor, Ark Temple Thomas Thompson Tillman Timberlake Towner Treadway Venable Vestal Vinson Volstead Walker Walton Wason Watkins Watson, Va Weaver Webb Welling Whaley Wheeler White, Me.

White, Ohio Williams Wilson, Ill Wilson, La. Wingo wise Wood, Ind. Woods, Iowa Woodyard Young, N. Dak. Young, Tex Zihlman.

Those who voted in the negative are—

Bacharach Blackmon Britten Bruckner Buchanan Caldwell Campbell, Pa Cantrill Carew Cary Chandler, N. Y. Church Clark, Pa Classon Coady Crago Crosser Dale, N. Y. Davidson Davis Dent Dewalt Dies Dominick Dooling Doremus Drukker Dupre Dyer Eagan Edmonds Estopinal Fairchild, B. L. Fitzgerald Flynn Francis Freeman Gallagher Gard Garland Garner Gillett Glynn Gordon Graham Pa. Gray, Ala Gray, N. J. Greene, Mass. Greene, Vt Griffin Hamill Hardy Haskell Heaton Heflin Huddleston Hulbert Hull, Iowa Igoe Juul Kahn Kennedy, R I Key, Ohio Lazaro Lea, Cal. Lehlbach Lesher Linthicum London Lonergan Longworth Lufkin McAndrews McArthur McLaoughlin, Pa McLemore Madden Magee Mann Mansfield Martin Mecker Merritt Moore, Pa Morin Mudd Nichols, Mich Nolan Oliver, N. Y. O'Shaunessy, Overmyer Parker, N. J. Phelan Porter Pou Ramsey Riordan Roberts Rodenberg Rouse Sabath Sanford Scott, Pa Shirley Sherwood Siegel Slayden Small Smith, C B Smith T. F Snyder Stafford Steele Sullivan Swift Talbott Templeton Tilson Van Dyke Vare Voigt Waldow Walsh Ward Watson, Pa Welty Wilson, Tex Winslow.

Whereupon, the Speaker announced that the yeas are 282 and the nays are 128, and two thirds having voted in the affirmative the joint resolution was agreed to.

A motion by Mr. Webb to reconsider the vote by which the joint resolution was agreed to was, on his motion, laid on the table. Ordered that the clerk request the concurrence of the Senate in the joint resolution as amended.

In testimony whereof, I have this day as Clerk of the House of Representatives, set my hand, and affixed the Great Seal of the House of Representatives, of the United States of America, on this the Ninth day of March, in the year of our Lord, nineteen hundred and eighteen.

SOUTH TRIMBLE,
Clerk of the House of Representatives.

These documents are printed in full in the New York Assembly Journal, 1918, Vol. 1, pp. 700-704.

It thus appears as a public record that the Joint Resolution proposing the Eighteenth Amendment originated in the United States Senate where it was passed by a vote of 65 to 20. It was amended in the House of Representatives, and, as amended, was declared agreed to by a vote of 282 to 128. The Senate thereafter, 69 Senators being present, agreed to the amendments by a vote of 47 to 8.

The full membership of the United States Senate is 96. The full membership of the House of Representatives is 435.

It cannot be urged in relation to this Amendment that the certificate of the presiding officers of the Senate and House of Representatives, that the Joint Resolution was passed two thirds of each House concurring therein, is conclusive in this Court.

The question of the constitutionality of the vote by which the amendment was proposed was left to this Court on the record by the Legislature of New York State. The question is therefore justiciable.

The Rule of *Stare Decisis* Does Not Preclude Its Reconsideration.

The Joint Resolution was presumably declared carried in accordance with the legislative precedent which has grown up in the Congress to the effect that each house is constituted as a "House" within the meaning of the Constitution when a quorum of the membership is present; and that "two thirds of both Houses", as mentioned in the Constitution signifies two thirds of those voting on the measure in each house, a quorum being present.

Hinds Precedents of the House of Representatives, Vol. 5, pp. 1009-10, 7027.

This construction has been approved by this Court.

> *Missouri Pacific Ry. Co.* v. *Kansas*, 248 U. S.;
> *National Prohibition Cases*, 253 U. S.

The question, however, being the construction of the Constitution of the United States, this Court has recognized that although the doctrine of *stare decisis* is a salutary one, and is to be adhered to on proper occasions in respect of decisions directly upon points in issue, the Court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

> *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429

In his first Inaugural Address, President Lincoln expressed this view in these words:

> "I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation be-

tween parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The contention herein advanced is that this precedent and these decisions of this Court are at variance with the express words and the intention of the Constitution, and therefore do not represent the Law of the Land as defined in paragraph 2 of Article VI of the Constitution.

This contention is chiefly based upon a letter written on January 5, 1804, by Gouverneur Morris to Uriah Tracy, then a member of the United States Senate from Connecticut, which was not considered when this question was before this Court.

This letter is printed in volume three at page 198 of the Life of Gouverneur Morris, written by Jared Sparks, published in 1832 from which the following extract is taken:

"The idea, that two thirds of the whole number of Senators and of the whole number of Representatives are required by the Constitution to propose an amendment, is certainly correct. There are, I believe, only six cases in which the majority of a quorum cannot act. In one of these cases, viz. the choice of a President by the House of Representatives, a majority of all the States is required, and the reason is evident.

"In two other cases, which respect only the Senate, two thirds of the members present are required. One of them is the case of treaties. To have bound the whole union by the act of a mere majority of Senators present would, in effect, have given the power of making treaties to the President, since, by watching opportunities, he could always have secured such majority. And to have demanded a majority of

the whole number might have occasioned delay, dangerous in many cases, and especially when a treaty of peace should be under consideration. By a provision of that sort, absentees would have given an efficient negative without direct responsibility. Of course, cunning men, some of whom will always be found in legislative bodies, would frequently have lain by to approve or disapprove, according to subsequent circumstances, which, in affairs so urgent as the ratification of national compacts, might have proved fatal.

"In the case of impeachment the same reasoning applies. If a mere majority could convict, public officers might be made the victims of party rage. If a majority of the whole number were required, members might, by absenting themselves, screen the guilty without incurring direct reproach. In the one case, faction would have too much, and in the other, justice would have too little power.

"There remain three cases in which two thirds of the whole number are required. These are, first, the expulsion of a member; secondly, the passage of a law disapproved of by the President; and, thirdly, amendments to the Constitution. In these three cases a provision is carefully made to defend the people against themselves, or, in other words, against that violence of party spirit, which has hitherto proved fatal to republican government. The constitutional restriction presumes, that, to a measure of indispensable necessity, or even of great utility, two thirds of the whole number of Senators and Representatives would agree, and that, if they should not, no great danger would ensue. The public business might go on, though a member of the legislature should be unworthy of his seat. Neither would the union materially suffer from the want of a particular law, especially of a law rejected by the first magistrate.

"The case of war may indeed be supposed, and the additional case of corrupt opposition by the President to the organization of public force; but even, if it were allowable to reason from extreme cases, which, as every one knows, would be fatal to all legal and constitutional provisions, yet, in this extremest case, the corrupt President could, with less danger of detection, do more evil by a misapplication of the public force, than by opposing its existence.

"So in the case of amendments to the Constitution, it was presumed, that America might enjoy a tolerable share of felicity under the existing compact, and that, if a case should arise to point out the necessity of amendment, two thirds of the whole number of each legislative body would concur in the recommendation."

The Federal Constitutional Convention of 1787 delegated to a Committee of five of its members the duty of drafting the Constitution as agreed upon in the Convention. This Committee consisted of William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison and Rufus King, and Gouverneur Morris was the actual draftsman of the Constitution, as appears by the following extracts taken from two letters, printed in the Life of Gouverneur Morris, above mentioned, at page 284 of volume one and page 322 of volume three, respectively:

James Madison to Jared Sparks: April 8, 1831.

"The *finish* given to the style and arrangement of the Constitution fairly belongs to the pen of Mr. Morris; the task having, probably, been handed over to him by the chairman of the Committee, himself a highly respectable member, and with the ready concurrence of the others. A better choice could not have been made, as the performance of the task proved. It is true, that the state of the materials,

consisting of a reported draft in detail, and subsequent resolutions accurately penned, and falling easily into their proper places, was a good preparation for the symmetry and phraseology of the instrument, but there was sufficient room for the talents and taste stamped by the author on the face of it. The alterations made by the Committee are not recollected. They were not such, as to impair the merit of the composition. Those, verbal and others, made in the Convention, may be gathered from the Journal, and will be found also to leave that merit altogether unimpaired."

Gouverneur Morris to Timothy Pickering, Dec. 22, 1814:

"But, my dear Sir, what can a history of the Constitution avail towards interpreting its provisions. This must be done by comparing the plain import of the words, with the general tenor and object of the instrument. That instrument was written by the fingers, which write this letter. Having rejected redundant and equivocal terms, I believed it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness, that it became necessary to select phrases, which expressing my own notions would not alarm others, nor shock their self love, and to the best of my recollection, this was the only part which passed without cavil.

"But, after all, what does it signify, that men should have a written Constitution, containing unequivocal provisions and limitations? The legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power, which it wishes to exercise, unless it be so organized, as to contain within itself the sufficient check. Attempts to restrain it from outrage, by

> other means, will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to their true intent and meaning, they will, when they feel a desire to go farther, avoid the shame if not the guilt of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose."

A study of the opinion of the Court in *Missouri Pacific Railway Company* v. *Kansas*, reveals that the Supreme Court placed strong reliance on a statement of fact, appearing in a foot note to George Ticknor Curtis's History of the Constitution. The inaccuracy of that statement is attested by the letter of Morris to Tracy, quoted above, and by the "Letters of a Landowner" written by Oliver Ellsworth, and hereinafter mentioned, neither of which letters were brought to the attention of the Court in either of the cases herein mentioned.

Amendment as Contrasted With Revolution.

The Constitution sought to provide a method by which the Government may be changed peacefully by Amendment, rather than forcibly by Revolution.

Curtis's History of the Constitution says of this subject, at Volume 2, pages 473-477 (italics mine):

> "The next topic on which the Convention was required to act was the question whether the Constitution should be made capable of amendment, and in what mode amendments were to be proposed and adopted. The Confederation, from its nature as a league between States otherwise independent of each other, was made incapable of alteration excepting by the unanimous consent of the States. It affords

a striking illustration of the different character of the government established by the Constitution, that a mode was devised by which changes in the organic law could become obligatory upon all the States, by the action of a less number than the whole.

"The frame of government which the members of the Convention were endeavoring to establish, if once adopted, was to endure, as a continuing power, indefinitely; and that it might, as far as possible, be placed beyond the danger of destruction, it was necessary to make it subject to such peaceful changes as experience might render proper, and which, by being made capable of introduction by the organic law itself, would preserve the identity of the government. The existence and operation of a prescribed method of changing particular features of a government mark the line between amendment and revolution, and render a resort to the latter, for the purpose of melioration or reform, save in extreme cases of oppression, unnecessary. According to our American theory of government, revolution and amendment both rest upon the doctrine, that the people are the source of all political power, and each of them is the exercise of an ultimate right. But this right is exercised, in the process of amendment, in a prescribed form, which preserves the continuity of the existing government, and changes only such of its fundamental rules as require revision without the destruction of any public or private rights that may have become vested under the former rule. Revolution, on the contrary, proceeds without form, is the violent disruption of the obligations resting on the authority of the former government, and terminates its existence often, without saving any of the rights which may have grown up under it. *The question, therefore, whether the Constitution should be made capable of amendment, was identical with the question whether some mode of amending it should be prescribed in*

the instrument itself, since, without an ascertained and limited method of proceeding, all change becomes, in effect, revolution; and this was accordingly, in substance, the same as the question whether revolution should be the only method by which the American people could ever modify their system of government, when in the progress of time changes might become indispensable.

"It was originally proposed in the Convention, that provision should be made for amending the Constitution, without requiring the assent of the national legislature.[1] But this was justly regarded as a very important question, and the Convention came to no other decision, when the committee of detail were instructed, than to declare that provision ought to be made for amending the Constitution whenever it should seem necessary.[2] The mode selected by the committee, and embraced in the first draft of the instrument, was to have a convention called by the Congress, when applied for by the legislatures of two thirds of the States; but they did not declare whether the legislatures were to propose amendments and the convention was to adopt them, or whether the convention was both to propose and adopt them, or only to propose them for adoption by some other body or bodies not specified. There lay, therefore, at the basis of this whole subject, the very grave question whether there should ever be another national convention, to act in any manner upon or in reference to the national Constitution, after its adoption, and if so, what its functions and authority were to be. There would follow, also, the further question, whether this should be the sole method in which the Constitution should be made capable of amendment. Several reasons concurred to render it highly in-

[1] Elliot, V 157.
[2] Elliot, V. 376.

expedient to make a resort to a convention the sole method of reaching amendments, and we can now see that the decision that was made on this subject was a wise one. It was a rare combination of circumstances that gave to the first national Convention its success. The war of the Revolution, and the exigencies which it caused, had produced a class of men, possessing an influence, as well as qualifications for the duty assigned to them, that would not be likely to be again witnessed. Of these men, Washington was the head; and no second Washington could be looked for. The peculiar crisis, too, occasioned by the total failure of the Confederation, notwithstanding the apparent fitness and actual necessity of that government at the time of its formation, could never occur again. There were, moreover, but thirteen States in the confederacy, nearly all of which dated their settlement and their existence as political communities from about the same period, and all had passed through the same revolutionary history. But the number of States was evidently destined to be greatly increased, and the new members of the Union would also be likely to be very different in character from the old States. It was not probable, therefore, that the time would ever arrive when the people of the United States would feel that another national convention, for the purpose of acting on the national Constitution, would be safe or practicable. Still, it would not have been proper to have excluded the possibility of a resort to this method of amendment; since the national legislature might itself be interested to perpetuate abuses springing from defects in the Constitution, and to incur the hazards attending a convention might become a far less evil than the continuance of such abuses, or the failure to make the necessary reforms.

"But it was indispensable that the precise functions and authority of such a convention should be

defined, lest its action might result in revolution. The method of amendment proposed by the committee of detail did not enable the Congress to call a convention on their own motion, and did not prescribe the action of such a body, or provide any mode in which the amendments proposed by it should be adopted. Hamilton and Madison both opposed this plan;—the former, because it was inadequate, and because he considered it desirable that a much easier method should be devised for remedying the defects that would become apparent in the new system; the latter, on account of the vagueness of the plan itself. Accordingly, Mr. Madison brought forward, as a substitute, a method of proceeding, which, with some modifications, became what is now the fifth article of the Constitution; namely, that the Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments; or, on the application of the legislatures of two thirds of the States, shall call a convention for proposing amendments. In either case, the amendments proposed are to become valid as part of the Constitution, when ratified by the legislatures of three fourths of the States, or by conventions in three fourths of the States, as the one or the other mode of ratification may be proposed by the Congress.'[1]

The Decision in the Prohibition Cases Should Be Reversed.

The Supreme Court decided the meaning of the words "two thirds of both houses," governing proposals of Amendments to the Constitution, for the first time in the National Prohibition Cases, 253 U. S.

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[1] Elliott, V. 530-532.

In those cases the Court had the assistance of oral argument as well as briefs, but the question then presented, to which this brief is directed, had previously been covered by the Court in *dicta* in another case known as *Missouri Pacific Railway Company v. Kansas*, 248 U. S. That case had been submitted without argument and in that case the Court was only supplied with four short and inadequate briefs to guide its determination. The Court adopted its own dicta in the Kansas case, as its *ratio decidendi* of the National Prohibition Cases on this point.

The letter written by Gouverneur Morris to Uriah Tracy, dated January 5th, 1804, was not referred to in any of the briefs submitted to the Supreme Court in any of the cases referred to, and practically nothing relied on in this brief was then before the Court.

The writer hopes that we may return to the meaning of the Fifth Article of the Constitution with which that letter shows it was written, and was proposed to and ratified by the People, and which its terms indicate, if not affected by construction and interpretation from extraneous sources.

This will necessitate a reconsideration and modification by the Supreme Court of its decision on this point in the National Prohibition Cases.

In the light of the letter of Gouverneur Morris, the draftsman of the Constitution, which has heretofore been overlooked by everybody, nothing seems to stand in the way of a modification by the Court of its decision, except the fear that some of the other amendments might be affected.

This fear is believed to be utterly groundless.

It is understood that those Amendments were passed in the manner approved at the time by the Legislative Precedents, were not formally questioned at the time of their proposal to the States, or of their ratification by the States, and they were all adopted many years ago. Moreover, the Court would undoubtedly decline to go back of the certificates of the proper officials who have, presumably, certified, in every case, that the resolutions proposing the amendments were passed, two thirds of both Houses concurring. No citizen may question them; and it is safe to surmise that no State would be heard to do so, at this late date.

The Fourteenth Amendment stands in a different position. It has been consistently opposed in the State of New York from the beginning, on the ground that it did not receive the required number of votes in Congress, and the roll calls of those votes, duly certified, were obtained by the Legislature and are in the archives of the Assembly.

N. Y. Assembly Journal; 1918; Vol. I, pp. 575-6, 634-5, 700-704.

History of the Amendments.

The Supreme Court in *Missouri Pacific Railway Company* v. *Kansas*, did not have the advantage of oral argument, as has been stated, and the four short briefs submitted made the most casual mention of the history of the Amendments, if they can be said to have touched this important subject at all.

The Court in its decision of that case gives considerable weight to the supposed precedents of the First Session of the First Congress.

The First Ten Amendments.

It is impossible, in the short compass of this brief to present a picture of that First Session. It was supposed to convene in New York City on the fourth of March, 1789. Eleven States by that time had ratified the Constitution, several of them with petitions, and one upon the condition, that Amendments would promptly be adopted incorporating in the Constitution a "Bill of Rights" as the Anglo Saxon race had come to know certain historical provisions defending the "inalienable rights of man". On the day set only eight Senators appeared, and it was not until those eight had twice sent forth appeals to the others, that, on April 6th, Richard Henry Lee, of Virginia, arrived, making the twelfth Senator, necessary for a quorum, and the Senate convened, and counted the ballots which showed that Washington had received the unanimous vote of the Presidential Electors for President.

Washington's First Inaugural Address to Congress.

On April 30th, Washington took the oath as President, on a gallery of the Federal Hall, on Wall Street, and afterwards delivered his first inaugural address to Congress in the Senate Chamber, in which he stated:

> "*Besides the ordinary* objects submitted to your care, it will remain with your judgment to decide, how far an exercise of *the occasional power delegated by the fifth article of the constitution* is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them.—Instead of undertaking particular recommendations on this subject, in which I

could be guided by no light derived from official opportunities, I shall again give way to my entire confidence in your discernment and pursuit of the public good:—for I assure myself that whilst you carefully avoid every alteration which might endanger the benefits of an united and effective government, or which ought to await the future lessons of experience; a reverence for the characteristic rights of freemen, and a regard for the public harmony, will sufficiently influence your deliberations on the question how far the former can be more impregnably fortified, or the latter be safely and advantageously promoted."

(Italics mine.) Senate Journal, First Ed. 1789, p. 25.

It will be noted that Washington did not include the proposal of Amendments to the Constitution in the *ordinary business* of Congress, as the Supreme Court seems to have done. He spoke of such an act as "*an exercise of the occasional power delegated by the Fifth Article of the Constitution*".

That is indeed high authority, which, so far as the writer is able to state, has not heretofore been cited to the Supreme Court *on this point*.

The Outlook of the Country in 1789.

In order to understand the action of the Congress in proposing the first ten amendments, it is necessary to appreciate the state of affairs which then confronted the country. Those were the days which John Fiske has aptly described as the "Critical Period of American History".

"Looking backward and thinking of the long life that the Constitution has enjoyed, and remembering how imme-

diate and great were the successes attending the organization of the new government and Hamilton's financial measures, one can hardly imagine the chaotic condition of affairs that confronted Washington when he took the oath of office in the spring of 1789. The strongest men of the country were behind him: Hamilton, Madison, Robert Morris, James Wilson, and those who had worked with them in the Federal Convention; John Jay, Thomas Jefferson, and John Adams, who had no part in the actual framing of the document; even Patrick Henry, George Clinton, and Samuel Adams, who had opposed its adoption,—all these men and many others in the second rank were anxious to see the new system given a full and fair trial. They cannot be said to have formed a political party, for they were held together by no organic bond, except that of patriotic desire for their country's welfare."

Channing, History of the U. S., Vol. 4, pp. 35-6.

"One thing that postponed attempts to divide the Union into two or three portions was the adoption of the first eleven amendments. In their eagerness for ratification, Washington and Madison had practically pledged themselves to labor for the passage of amendments that would make the Constitution more palatable." *Ib.*, p. 157.

The only real opposition that existed to the proposals, which ultimately became the first ten amendments, was on the ground that a Bill of Rights had no place in the Constitution. No one denied the propositions stated in the amendments, but they were considered by many to be self evident.

James Wilson, speaking in the Pennsylvania Convention, called to ratify the Constitution, had said that he did not

remember hearing of a motion to include a Bill of Rights in the Constitution during the debates in the Convention.

See Elliot's Debates, Vol. 2, p. 435.

Yet all realized that many of the people wished that amendments might be adopted, restraining the new National Government, and assuring them of their "inalienable rights".

The necessity for amendments, to allay public anxiety, is clear from the debates in the House, reported in the Annals of its First Session. (First printed in 1834.)

Washington, never a partisan, had alluded to this need in his Inaugural, and had spoken, with characteristic moderation, of the "nature of objections which have been urged against the system, or by the degree of inquietude which has given birth to them." *supra.*

James Madison, later a Jeffersonian Republican, in support of the Amendments which he had introduced in the House, had said, in answer to those who thought them unnecessary:

> "But I do wish to see a door opened to consider so far as to incorporate those provisions for the security of rights, against which I believe no serious objection has been made by any class of our constituents: such as would be likely to meet with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures."

Annals (Edition of 1834), p. 433, and see p. 424.

Elbridge Gerry, later a Jeffersonian Republican, expressed the anxiety all felt as follows:

> "Whatever might have been my sentiments of the ratification of the constitution without amendments, my sense now is, that the salvation of America de-

> pends upon the establishment of this Government, whether amended or not. If the constitution which is now ratified should not be supported, I despair of ever having a Government of these United States."
>
> Annals, p. 445.

Thus, though many of the statesmen then in Congress thought the "Bill of Rights" was secure without Amendment under the original Constitution, they "deemed it necessary" to propose the Amendments within the meaning of the Fifth Article of that instrument, as the whole course of their proceedings shows.

THE JOURNALS OF THE FIRST SESSION OF CONGRESS.

There are kept, in the vault of the Association of the Bar of the City of New York, copies of the Journals of the Senate and of the House of Representatives of the First Session of the First Congress, the former printed in 1789, the latter printed by Francis Childs and John Swaine, undated, but apparently contemporaneous.

The writer has spent considerable time in perusing these Journals, for the reason that Speaker Thomas B. Reed, in stating the rule which governs Congress in the interpretation of the Fifth Article of the constitution, has said:

> "The first Congress, I think, had about 65 members, and the first amendment that was proposed to the Constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our Government and disposed of in that way."
>
> Hinds Precedents, Vol. 5, p. 1010.

This ruling has been adopted by the Supreme Court in the case of *Missouri Pacific Railway Company* v. *Kansas,* and in the National Prohibition Cases, as the Law of the Land, governing the Fifth Article of the constitution. The Court says:

> "At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it."
>
> *Missouri Pacific Railway Co.* v. *Kansas,* 248 U. S. 276, 281-2.

Courage would fail the writer to question such high authorities, but for the fact that he believes that, in so doing, he is defending the action, in the First Congress, of the patriotic Americans who with Washington framed our Constitution, and the others who were then struggling to help Washington start our Government.

The writer has not had time to more than skim the surface of this vastly important subject, but he refers, in defence of his respectful doubt of the accuracy of the conclusion of a great Speaker and of the great Court, to the proceedings in that First Session.

There appears, in the Senate Journal, no roll call on any of the proposals in the Senate.

The writer, with respectful regard for the high authority to the contrary, submits that, in his opinion, there

appears, in the House Journal, no roll call on any of the proposals in the House.

The writer has transcribed from the House Journal such entries as show the course of the Amendments through the House. These entries are submitted as an appendix to this brief. They are believed to be accurately transcribed, but the proof has not been compared back to the original Journal for lack of time, and if inaccuracies are found in them, they are unintentional.

The House was not unmindful of the constitutional requirement of a vote of two-thirds of the members.

Annals, pp. 433, 445, 660, 663, 664, 709, 716, 717.

So far as the writer has been able to find, there was no ruling made at that Session of Congress, in either House, as to what constituted two-thirds. But a significant entry appears in the Annals, where Mr. Livermore raised the question whether it was necessary, in committee, to carry a motion that two-thirds should agree. This led to a ruling in committee that a majority vote was sufficient for that purpose. The Annals speaks of there being some desultory conversation on the subject.

Annals, p. 717.

It may be that, in committee, it was decided, that, owing to the political necessity of the proposal of amendments, the members would all agree to the constitutional two-thirds of the whole House, on the final passage of the proposals in the House. There must have been some such understanding in both Houses, as it is most extraordinary that no roll-calls should be recorded in either House in the final passage of any proposed amendment (unless Speaker

Reed is right in construing the vote on the changes in the wording of the eighth proposal, recorded in the House Journal of September 24th, as such a final roll-call on the proposal of the amendments).

And yet after the ruling in the First Session above mentioned, in committee, Mr. Livermore stated that he did not care about the preamble because, "when it got before the House, it would be undone if one member more than one-third *of the whole* opposed it."

Annals, p. 718.

What the writer believes to have been the first mistake in appraising the action of the First Session of Congress, appears to have been made in the House on passage of the proposal of the Twelfth Amendment.

In the brief submitted by counsel for the Attorneys General of twenty-four States, in the case of *Kentucky Distilleries, etc.* v. *Gregory*, page 4, one of the National Prohibition Cases, the statement appears that when the Senate vote on the Twelfth Amendment was brought before the House, it was objected that the vote was not constitutional. This objection was met by appealing to the asserted precedent of the first ten amendments "showing that two-thirds of the members present fulfilled the constitutional requirement." The brief referred to the Annals of Congress, Eighth Congress, First Session, pp. 648-653.

It is submitted, in answer to this, that the following remarks of Elbridge Gerry may show that the attitude of the First Session in framing the proposals was consciously such as to attract the two sister states, Rhode Island and North Carolina, and the form "those present" may possibly have been used to suggest that those States were not outsiders.

"There are two States," he said, "not in the Union; it would be a very desirable circumstance to gain them. I should therefore be in favor of such amendments as might tend to invite them and gain their confidence; good policy will dictate to us to expedite that event. Gentlemen say, that we shall not obtain the consent of two thirds of both Houses to amendments. Are gentlemen willing then to throw Rhode Island and North Carolina into the situation of foreign nations? They have told you that they cannot accede to the Union, unless certain amendments are made to the constitution; if you deny a compliance with their request in that particular, you refuse an accommodation to bring about that desirable event, and leave them detached from the Union."

Annals, p. 445.

With all humility, and with due deference to the great men who have passed on the question, the writer submits that there are no precedents to be found in the record of the House of Representatives of the First Session of the First Congress that the requirements of the vote for the proposal of amendments to the Constitution are satisfied by an affirmative vote of two-thirds of a quorum. This question should be investigated further and all the facts should be brought out, so that this question may be settled. It is submitted that considering its importance this question has never received adequate attention.

The Senate Journal shows that on August 25, 1789, Mr. Beckley, the Clerk of the House of Representatives brought up the Resolve of the House that seventeen Amendments to the Constitution therein set forth be proposed to the Legislatures of the States, and requested the concurrence of the Senate therein. The proposed Joint Resolution contained

the words "*two-thirds of both Houses deeming it necessary*".

(Italics mine.) Senate Journal, page 103.

The final form, adopted after conference, of the preamble to the twelve articles of amendment which were proposed to the eleven States which had ratified and to the two which had not, is as follows:

> "The Conventions of a Number of the States having, at the Time of their adopting the Constitution, expressed a Desire, in order to prevent misconstruction or abuse of its Powers, that further declaratory and restrictive clauses should be added: And as extending the Ground of public Confidence in the Government, will best insure the beneficent Ends of its Institution—
>
> *Resolved*, by the Senate and House of Representatives of the United States of America in Congress assembled, *two-thirds of both Houses concurring*, That the following Articles be proposed to the Legislatures of the several States", &c.
>
> (Italics mine.) Senate Journal, page 163. And see *idem.*, Sept. 8, 1789.

Why the change was made from the words "two-thirds of both Houses deeming it necessary" to the words "two-thirds of both Houses concurring" is not disclosed in the Senate Journal. Possibly the reason was that quite a number of members thought a Bill of Rights had no rightful place in the Constitution.

Senate Journal, p. 123.

But the Supreme Court relies on the form of the original record in the Senate Journal, which reports the action

of the Senate as concurring in the House resolve in the terms "two-thirds of the Senators present concurring therein", and the record of the House Journal which agreed to amendments "two-thirds of the members present concurring on each vote" as demonstrating that these records were formulated with the purpose of refuting the contention now made.

Yet the absence of Representatives and Senators from Rhode Island and North Carolina, who were specifically mentioned in the Constitution; and the fact that the National Flag itself, which had been adopted by the resolution of the Continental Congress passed June 14, 1777, and floated over the First Congress with its "thirteen stars, white in a blue field, representing a new constellation"; made the difficulty of the Clerks in formulating the entries in the Journals of the action of the members present very great under the circumstances, there being Senators and Representatives from only eleven states present.

The opinion of the Court also states:

> "When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated."
>
> 248 U. S. 282

Yet there is in the New York Public Library an original manuscript letter, dated August 24, 1789, by Mr. Madison to his fellow member of the House from Virginia, Mr.

> "The week past has been devoted to the subject of amendments. All that remains is a formal vote on a fair transcript, which will be taken this morning; and without debate I hope, as each of the propositions has been agreed to by two-thirds of the House."

This letter which is also published in Madison's works, would seem to indicate that by the entries "two-thirds of the members present", the Clerk meant two-thirds of all the members from the eleven states which had ratified the Constitution and were represented in the First Congress. Mr. Madison's letter was written before the meeting which was to vote on the amendments, and he could not, in advance of the meeting, have referred to a quorum when he stated that each of the propositions had been agreed to by two-thirds of the House.

It is respectfully submitted that no adequate study of this subject has yet been made, but, if the Senate in its resolution changed the words "deeming it necessary" (the words of the Constitution), to the words "concurring therein", although the record shows that for reasons of expediency they deemed it vitally necessary, possibly the words "two-thirds of the Senators present" were used instead of the words "two-thirds of the Senate" for the reason that they had in mind the Senators whom they hoped would soon be sent to the Senate from the remaining States but who were not yet present.

Senate Journal, p. 131.

The proposal actually communicated to the States was in the words: "*Resolved*, by the Senate and House of Representatives of the United States of America in Congress

assembled, two-thirds of both Houses concurring. That the following Articles be proposed to the Legislatures of the several States, * * * "

Senate Journal, p. 163.

It is respectfully submitted with some confidence that the suggestion that the First Session of the First Congress disregarded the Constitutional requirements of the Fifth Article of the Constitution as written, is not supported by the record.

The Eleventh Amendment.

This Amendment providing that a State could not be sued in the Federal Courts by citizens of another State or Country, was proposed in 1794.

In the Senate of 30 members, the vote was 23 to 2.

Annals Third Congress, p. 30;
Senate Journal, Third Congress, p. 31.

In the House of about 95 members, the vote was 81 to 9.

Annals Third Congress, p. 477;
House Journal, Third Congress, pp. 165-6.

The writer has counted the number of members of the Third Congress that are reported in the Journal thereof as having appeared and taken the oath prior to the passage of the resolution proposing the Eleventh Amendment. The figure given is believed to be correct.

This Amendment seems to have been proposed in compliance with the requirements of the Fifth Article of the Constitution as written, with due deference to the statement

to the contrary in the opinion in *Missouri Pacific Railway Co.* v. *Kansas,* 248 U. S. 276, 283.

It is humbly and respectfully submitted that the requirements of the Fifth Article of the Constitution were adhered to during Washington's administration.

The Twelfth Amendment.

A few words must be said of the Twelfth Amendment, and of the circumstances surrounding its proposal. In the belief of the writer, from such study as he has been able to give to this great subject, the action of the Senate at the time of their proposal of that Amendment, to which Gouverneur Morris's letter to Senator Tracy refers, was the first instance of disregard for the requirements of the Fifth Article of the Constitution, as written.

The Presidential election of 1800 was held under the old electoral college system as provided for in the Second Article of the original Constitution, by which the person receiving the largest number of electoral votes became President and the one for whom the second largest number of votes were cast became the Vice-President.

In February, 1801, the Electoral votes were counted and were found to be: for Thomas Jefferson, 73; for Aaron Burr, 73; for John Adams, 65; for Charles Cotesworth Pinckney, 64, and for John Jay, 1. There was no name highest on the list, consequently there was no choice, and the election was to be made by the House of Representatives, between the two highest candidates, each State having one vote. The House was Federalist, but was restricted to a choice between two Republicans. Of the two, many Federalists preferred Burr, partly to keep the Presidency

from their most dangerous enemy, Jefferson, and partly to baulk the evident intention of the Republicans. The balloting began February 11th. Eight states voted for Jefferson, six for Burr, and two were without votes, because of equal division among their members. There being sixteen States, there was yet no election. Balloting continued until February 17th, when ten States voted for Jefferson, four for Burr, and two blank, and Jefferson was declared elected President, and Burr Vice-President.

This was the first great political revolution since 1787, except that the Federalists still had control of the Judiciary.

The Judiciary Law passed at the last session of the Congress had erected twenty-four new Federal Courts. The Republicans claimed that there had not been business enough to occupy the United States Courts already in existence, that the bill creating the Courts had been hastily drawn after the Republican success in the last election, in order to provide offices for Federalist leaders, and that President Adams had been kept busy till midnight of his last day of office in signing commissions for the judges. All this seemed to the Republicans a gross abuse of power and they proposed to repeal the Judiciary Law. The Constitution seemed plainly to prohibit any such repeal. Party necessities and vindictiveness, however, soon found available interpretations for the Constitution and the law was repealed, and the Federalists driven forever from power, and Congress adjourned. This account is summarized from Johnston's American Politics.

The first session of the next Congress proposed what is known to us as the Twelfth Amendment, changing the manner of the Presidential election.

Resolutions proposing the amendment were introduced in the House on the first day of the session, and in the Senate on the fifth day.

Annals 8th Cong., 1st Sess., pp. 372, 15.

The Resolution in the Senate was bitterly fought, and Senator Uriah Tracy, from Connecticut, made a speech on the Fifth Article of the Constitution, a copy of which he sent to Gouverneur Morris asking his views as to its accuracy, which called forth the reply of Morris, dated January 5, 1804, quoted above.

3 Morris, 198.

In adverting to the vote required under the Fifth Article, Senator Tracy said in his speech that this was a point which, "I am told has never been agitated, but is certainly worthy of attention."

In the Senate of 34; the vote was 22 to 10.

In the House of 136; the vote was 84 to 42, the speaker voting yea.

Annals 8th Congress, 1st Session, pp. 175-6; 209; 775.

Morris, a Federalist, had been Senator from New York, but his term had ended March 4, 1803, and he had retired to Morrisania, the New York Legislature being then Republican. He had, as Senator, communicated to the Senate resolutions of the New York Legislature favoring this then proposed Amendment to which he was opposed, as he stated to the New York Legislature, for the reasons he thus expressed:

"First, I am opposed to amendments, on the general ground that changing the articles of a constitutional compact lessens that respect for it, which is a main support of free governments.

"Secondly, I am opposed, because it is, generally speaking, better to bear an evil, which we know, than hazard those which we are unacquainted with.

"Thirdly, I am opposed, because the present mode seems preferable to that which is proposed."

3 Morris, 174.

Though a Federalist, Morris was more a patriot than a partisan. Writing to Robert R. Livingston, a Republican, he says: "I am connected with the members of my party by their worth, and by their kindness. If I could for a moment suppose they harbored designs unfriendly to our country, that moment the connexion would be dissolved. But I have all the evidence which the nature of the case admits that their views are honorable, just and patriotic. I believe this also of many among your party, and among your present adversaries."

1 Morris, 485.

Jared Sparks, commenting on Morris, says that,

"It must however be kept in mind, that his political views were essentially his own, and that, although he chose to range himself in the line of the Federalists, he did not pretend to act with them in all respects as a party. On the contrary, he was opposed to some of their prominent measures. Hence it would be an error to confound any speculations, dogmas, or statments in his writings with federalism, as recognized by the party at that time; or to consider the party responsible for them as coming from a leader of their ranks. He carried into politics,

as into everything else, his bold and independent turn of thinking, and on all subjects he was accustomed to express his opinions with prompt decision, a fearless freedom, and an indifference to public censure or applause. He was often consulted by members of Congress on the important questions before that body, and his correspondence will show with what unreserve and fulness he uttered his sentiments and counsels."

1 Morris, 486.

Gouverneur Morris died November 6, 1818.

"Let us forget party," said he, "and think of our country which embraces all parties."

1. Curtis's Constitution, 447.

That Morris in his letter merely stated what every one understood when the Constitution was adopted is shown by many contemporary statements. Among others:

Madison, writing to Jefferson, on June 13, 1789, spoke of the proposals which became the first amendments "as most likely to pass through two thirds of the House and of the Senate."

Richard Henry Lee, Senator from Virginia in the First Congress, writing to George Mason who had served with him in the Convention of 1787, said: "In the Fifth Article it is stated that two thirds of Congress may propose amendments."

Patrick Henry, speaking in the Virginia Convention of 1788, said: "Two thirds of the Congress or of the State Legislatures are necessary even to propose amendments. If one third of them be unworthy they may prevent the application for amendments."

Elliot, Vol. III, p. 49.

That he appreciated the different requirements of the vote on treaties is shown by his statement: "Two thirds of the Senators present can make treaties." Ib. p. 650.

Noah Webster, in a pamphlet published in Philadelphia in 1787, wrote: "Two thirds of both houses of Congress or the application of two-thirds of the Legislatures may open the door for amendments."

Roger Sherman, a member of the Convention of 1787, and of the First Congress, writing to John Adams, then Vice President, on July 20, 1789, said: "But if two thirds of the members of each house, after considering the reasons offered by the President should adhere to the former opinion, will not that be the most safe foundation to rest the decision upon?"

Adams's Works, Vol. VI, p. 439.

Rufus King, a member of the Committee on Style of the Convention of 1787, and Senator from New York in the First Congress, speaking in the Massachusetts Convention of 1788, said: "When the Governor objects to a bill it cannot become law unless two thirds of both branches afterward concur in enacting it; the same must be done by the Congress provided the President objects." * * * "Treaties * * * "may be formed by the President with the advice of two thirds of a quorum of Senators present."

Life and Correspondence, Vol. I, p. 306.

Oliver Ellsworth, member of the Committee of Detail of the Convention of 1787, which committee George Ticknor Curtis thought changed the vote requisite to overrule the veto, in which thought he has been followed by the Supreme Court in the *Kansas* case, writing in the "Letters of a Landowner" before the Connecticut Convention in

1788, said: "It is an excellency of this Constitution that it is expressed with brevity and in the plain common language of mankind." And speaking of the President's veto, he said: "If he returns the bill with his objections, the Senate and Representatives consider it a second time, and if two thirds of them adhere to the first resolution, it becomes law notwithstanding the President's dissent." This statement by a member of the Committee of Detail of the Convention of 1787 shows that George Ticknor Curtis's note in his History of the Constitution, Vol. 2, p. 267, note, quoted by the Supreme Court, is a mistake.

Was Usurpation Transformed Into Precedent?

After the adoption of the Twelfth Amendment no other was adopted until the necessity arose of making Lincoln's Emancipation Proclamation, which was recognized by its author as a war measure, a part of the Federal Constitution.

The Thirteenth Amendment was proposed to the States on February 1st, 1865. In the interval since December 12, 1803, on which the Twelfth Amendment was proposed, there had been discussions in Congress of other proposals, and action taken thereon, which are interesting, as showing the transformation of the legislative action (which the writer believes to have been a clear act of usurpation by Congress) in proposing the Twelfth Amendment by less than two-thirds of the whole Houses, into the present established precedent in Congress.

In view of certain assertions of the Court in its opinion in *Missouri Pacific Railway Company* v. *Kansas*, the statements under this heading are made with due deference to the great Court, but with sincere belief that they are true.

It will need much careful research and study to digest

all the Congressional precedents. The subject is worthy of this study, however, as there is grave danger that, in the future, some of the numerous proposals now before Congress, or others yet to come, may distort the Constitution, if the present construction of the Fifth Article of the instrument is adhered to.

The precedents in Congress in relation to the vote necessary to propose an Amendment are set forth in Hinds' Precedents: §§7027-7038.

And see in relation to the meaning of the two-thirds required in the passage of bills over the veto of the President, *Ib.* §§3537, 3538.

Time does not suffice to digest and state these precedents for use in this brief. It may be said, however, that the precedents are by no means uniform, or clear, and that, to understand them, the actual debates in Congress must be read, with sufficient imagination to appreciate the varying surroundings and circumstances in which they were passed.

To the writer they seem to show that, in the early days, two thirds of all the members were recognized as necessary. During the Civil War period, and the years leading up to it, doubt, and a somewhat illogical and careless construction of the words of the Constitution, appear, with reliance on the Supreme Court as the ultimate arbiter. Finally, Speaker Reed's absolute ruling was made in 1898.

Speaker Reed's Rule.

On May 11, 1898, Mr. John B. Corliss, of Michigan, called up a joint resolution proposing an amendment to the Constitution providing for the election of Senators of the United States. The question being taken on the passage of the resolution, there were yeas 184, nays 11, and the Speaker announced that the joint resolution was passed, two-thirds

having voted in favor thereof. Mr. Ebenezer J. Hill, of Connecticut, made the point of order that the vote required was two-thirds of the entire membership, not two-thirds of a quorum.

The Speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says 'two-thirds of both Houses'. What constitutes a House? A quorum of the membership, a majority, one half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what States are present and represented, or what States are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the States directly, and they pass upon it.

"The first Congress, I think, had about 65 members, and the first amendment that was proposed to the Constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our Government and disposed of in that way."

Hinds' Precedents of the House of Representatives, vol. 5, pp. 1009-1010; §7027.

The Supreme Court has adopted this later construction of the Fifth Article of the Constitution, and has fully accepted Speaker Reed's rule.

Missouri Pacific Ry. Co. v. *Kansas*, 248 U. S. 276, 283-4.

THE THIRTEENTH AND SUBSEQUENT AMENDMENTS.

The Emancipation Proclamation crowns the greatest achievement of our National history, and justly ranks, in the minds and hearts of the People, with the Declaration of Independence and the Constitution.

Nothing can ever disturb it, and, whether technically proposed or not, the Thirteenth Amendment, which wrote it into the Constitution, is so much a part of our History that no man would ever wish or dare to question it. It is a sacred covenant with an injured race, sealed with the best blood of young America, from North and South.

The other and subsequent Amendments may all be considered secure in the light of History. They were proposed in the manner approved at the time by Congressional usage and precedent, were not formally questioned when proposed and were ratified by the States. The certificates of their proposal, ratification and adoption are, presumably, fair on their face, and the vote by which they were adopted is probably not a justiciable matter. The time for technical objection to them is long passed.

But a very different question is raised when it is attempted to adopt Speaker Reed's rule of construction of the Fifth Article, as the rule for future guidance of the Court in questions of Amendments to be proposed in the future.

The Eighteenth Amendment.

And it is submitted that the right to question the Eighteenth Amendment may not have been lost, especially by the State of New York.

In New York, the objection was made before the Joint Committee of the New York Legislature by Everett P. Wheeler in 1918, when the Amendment was first proposed, that the proposal had not received the vote in Congress required by the Constitution.

This was followed by a minority opinion on that ground in the Judiciary Committee of the Assembly of 1918, and opposition on that ground from the floor of the Assembly, which was overruled by the Speaker, who declared that question would have to be passed on by the Supreme Court. The New York Legislature, by Joint Resolution called for and received duly certified roll calls on the proposal of the Amendment from both Houses of Congress. The question was later briefed in the Supreme Court in the Public Interest.

> N. Y. Assembly Journal, 1918, vol. I, pp. 575-6, 634-5, 700-704.

So that, if the Supreme Court inclines to modify its decision, while the other Amendments will stand unshaken, it must be recognized that the decision of the Court was rendered in regard to the Eighteenth Amendment, and any modification of it might affect that Amendment.

The Constitution.

The Constitution belongs to all the People.
It was given to us by Washington.

When, in the past, it has been assailed, the People have defended it; last, with the help of Lincoln.

Now, it is again in danger. Personal and party prejudices are running strong. Transitory measures are blinding us to the true issues.

We don't know whom to trust.

Story, in the concluding paragraph of his Commentaries on the Constitution, says of it: "It" (the Constitution) "has been reared for immortality, if the work of man may justly aspire to such a title. It may nevertheless perish in an hour by the folly or corruption or negligence of its only keepers,—THE PEOPLE."

This brief is filed in the hope that one of the People may help the Court to ascertain the Truth.

After reading what Gouverneur Morris, the draftsman of the Constitution, says of its meaning, and after reading the Journals of the Senate and House of the First Session of the First Congress, in the light of history, is it clear that Speaker Reed was right?

Only eleven of the thirteen States were then represented by Senators and Representatives.

The anxiety lest the new Government fail was very evident.

Do the words of the Senate Resolution in the First Session of the First Congress concurring in the House Resolve in the terms—"two thirds of the Senators present concurring therein"—make it clear that two-thirds of a quorum are sufficient to propose Amendments?

This may become a very important question in the life of the Constitution.

Is there not evidence in the record of the First Congress that the patriots who composed it were willing to put aside their individual ideas to get the Constitutional majority and at the same time not offend the States of Rhode Island and North Carolina?

Speaker Reed's pronouncement, which the Supreme Court has adopted, as the Law of the Land, it is submitted, pales in the light of Washington's First Inaugural.

We need help to see the Truth.

At such a crisis, it is altogether fitting that we should turn, for help, to Washington.

It is respectfully urged that the Eighteenth Amendment to the Constitution was not proposed in accordance with the provisions of the Constitution, and is void, and that the judgment appealed from should be affirmed.

Respectfully submitted,

ELIOT TUCKERMAN
(As *Amicus Curiae*).

APPENDIX.

EXTRACTS AND STATEMENTS TAKEN FROM THE JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE FIRST SESSION OF THE FIRST CONGRESS. PRINTED BY FRANCIS CHILDS AND JOHN SWAINE (NOT DATED BUT BELIEVED TO BE CONTEMPORANEOUS), RELATING TO THE FIRST TEN AMENDMENTS PROPOSED TO THE LEGISLATURES OF THE UNITED STATES BY CONGRESS.

Tuesday, May 5, 1789. The House in replying to the clauses of President Washington's First Inaugural Address referring to the proposal of Amendments to the Constitution said:

> "The question arising out of the fifth article of the Constitution will receive all the attention demanded by its importance; and will, we trust be decided, under the influence of all the considerations to which you allude." Page 33.

Monday, June 8. "A motion was made and seconded, that the House do come to a resolution, stating certain specific amendments, proper to be proposed by Congress, to the legislatures of the States, to become, if ratified by three fourths thereof, part of the Constitution of the United States:—Whereupon, ORDERED, that the said motion be referred to the consideration of the committee of the whole House, on the state of the Union". Page 57.

Tuesday, July 21. On motion, the committee of the whole House, was discharged from proceeding on the motion of June 8th and that motion together with the amendments proposed by the several States were "referred to a committee to consist of a member from each State, with instruction to take the subject of amendments to the Constitution of the United States generally into their consideration, and to report thereupon to the House." Page 79.

"The members elected Mr. Vining, Mr. Madison, Mr. Baldwin, Mr. Sherman, Mr. Burke, Mr. Gilman, Mr.

Clymer, Mr. Benson, Mr. Goodhue, Mr. Boudinot, and Mr. Gale." Page 80.

Tuesday, July 28. "Mr. Vining, from the committee of eleven, to whom it was referred to take the subject of amendments to the Constitution of the United States, generally, into their consideration, and to report thereupon, made a report, which was read, and ordered to lie on the table." Page 85.

Monday, August 3. "On motion, RESOLVED, That this House will on Wednesday se'nnight resolve itself into a committee of the whole House to take into consideration the report from the committee of eleven, to whom it was referred, to take the subject of amendments to the Constitution of the United States, generally, into their consideration, and to report thereupon". Page 88.

The Committee of the whole House accordingly considered the matter on Thursday, August 13; Friday, August 14; Saturday, August 15; Monday, August 17. Pages 100, 101, 102.

Tuesday, August 18. "On motion made that the House do agree to the following order, to wit: 'That such of the amendments to the Constitution proposed by the several States, as are not in substance comprised in the report of the select committee appointed to consider amendments, be referred to a committee of the whole House; and that all the amendments which shall be agreed to by the committee last mentioned, be included in one report.'

"The previous question was demanded by five members. Shall the main question to agree to the said order be now put?—And on the question, Shall the main question be now put?

"It passed in the negative, { AYES, 16. / NOES, 34.

"And so the motion was lost.

"The ayes and noes being demanded by one fifth of the members," the roll call follows. Page 102.

The committee of the whole House again proceeded, and, when the Speaker resumed the chair, reported that the

Committee had had the report of the committee of eleven under consideration, and made several amendments thereto which were read and ordered to lie upon the table. Page 103.

A motion was made that a number of amendments to the Constitution therein mentioned, should be referred to the consideration of the committee of the whole House. It passed in the negative. Pages 103-4.

The amendments to the report of the committee of eleven, proposed by the Committee of the whole House were considered on Wednesday, August 19, and Thursday, August 20. Page 106.

Friday, August 21. "The House resumed the consideration of the amendments made by the committee of the whole House, to the report from the committee of eleven, to whom it was referred to take the subject of amendments to the Constitution of the United States, generally into their consideration; and the said amendments being partly agreed to, and partly disagreed to.

"The House proceeded to consider the original report of the committee of eleven, consisting of seventeen articles, as now amended; whereupon the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh twelfth, thirteenth, fourteenth, fifteenth and sixteenth articles being again read and debated, were, upon the question severally put thereupon, agreed to by the House, as follows, two thirds of the members present concurring, to wit:" Page 107.

Here follow the sixteen proposals.

"The seventeenth article in the words following, to wit, 'The powers not delegated by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,' being under debate, a motion was made, and the question being put to amend the same by inserting after the word '*not*', the word '*expressly*'.

"It passed in the negative, { AYES, 17. / NOES, 32.

"The ayes and noes being demanded by one fifth of the members present," * * * Then follows a roll call. Page 108.

"And then the main question being put that the House do agree to the said seventeenth article:

"It was resolved in the affirmative, two-thirds of the members present concurring." Page 109.

A motion was then made to add to the articles another, it passed in the negative 23 to 28 and the ayes and noes being demanded by one-fifth of the members present a roll call is printed. Further consideration of the amendments was postponed until the next day. Pages 109-10.

Saturday, August 22. A motion was made to add another amendment, which passed in the negative 9 to 39, and the ayes and noes being demanded by one-fifth of the members present, a roll call is printed. Pages 110-11.

Four other amendments were then proposed and passed in the negative without stating the vote. Page 111.

"On motion, Ordered, That it be referred to a committee of three, to prepare and report a proper arrangement of, and introduction to the articles of amendment to the Constitution of the United States, as agreed to by the House; and that Mr. Benson, Mr. Sherman, and Mr. Sedgwick be of the said committee." Page 112.

Monday, August 24. "Mr. Benson, from the committee appointed, reported according to order, an arrangement of the articles of amendment to the Constitution of the United States, as agreed to by the House on Friday last; also a resolution proper to be prefixed to the same, which resolution he delivered in at the clerk's table, where the same was twice read and agreed to by the House, as followeth:

"Resolved, By the Senate and House of Representatives of the United States of America in Congress assembled, two-thirds of both Houses deeming it necessary, That the following articles be proposed to the legislatures of the several states, as amendments to the Constitution of the

United States, all or any of which articles when ratified by three-fourths of the said legislatures, to be valid to all intents and purposes as part of the said Constitution.

"ORDERED, that the clerk of this House do carry to the Senate a fair engrossed copy of the said proposed articles of amendment, and desire their concurrence." Pages 112-113.

Thursday, September 10. "A message from the Senate by Mr. Otis, their Secretary.

"Mr. Speaker—The Senate have agreed to the resolution of this House of the 21st ult. containing certain articles to be proposed by Congress to the legislatures of the several States, as amendments to the constitution of the United States, with several amendments, to which they desire the concurrence of this House: and then he withdrew." Page 134.

Saturday, September 19. "The House proceeded to consider the amendments proposed by the Senate to the several articles of amendment to the Constitution of the United States, agreed to by this House, and sent to the Senate for their concurrence, and having made some progress therein,

ORDERED, That the further consideration of the said amendments be postponed until Monday next." Page 145.

Monday, September 21. "The House resumed the consideration of the amendments proposed by the Senate to the several articles of amendment to the Constitution of the United States, as agreed to by this House, and sent to the Senate for concurrence:

Whereupon,

"RESOLVED, That this House doth agree to the second, fourth, eighth, twelfth, thirteenth, sixteenth, eighteenth, nineteenth, twenty-fifth, and twenty-sixth amendments, and doth disagree to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth

amendments proposed by the Senate to the said articles, two-thirds of the members present concurring on each vote.

"Resolved, That a conference be desired with the Senate on the subject matter of the amendments disagreed to, and that Mr. Madison, Mr. Sherman and Mr. Vining, be appointed managers at the same on the part of this House.

"Ordered, That the Clerk of this House do acquaint the Senate therewith, and desire their concurrence." Page 146.

* * * * * *

A message from the Senate by Mr. Otis, their Secretary.

"Mr. Speaker—* * * The Senate do also recede from their third amendment disagreed to by this House to the articles of amendment to the constitution of the United States, which were agreed to by this House, and sent to them for concurrence: And do insist on the other amendments to the said articles, disagreed to by this House: They have also agreed to the conference desired by this House on the subject matter of the amendments disagreed to, and have appointed managers at the same on their part: And then he withdrew." Page 147.

Wednesday, September 23. "Mr. Madison from the managers appointed on the part of this House to attend a conference with the Senate on the subject matter of the amendments depending between the two Houses to the articles of amendment to the Constitution of the United States, agreed to by this House, and sent to the Senate for their concurrence, made a report, which was read, and ordered to lie on the table." Page 151.

Thursday, September 24. "The House proceeded to consider the report of a committee of conference, on the subject matter of the amendments, depending between the two Houses to the several articles of amendment to the constitution of the United States, as proposed by this House: Whereupon,

"RESOLVED, That this House doth recede from their disagreement to the first, third, fifth, sixth, seventh, ninth, tenth, eleventh, fourteenth, fifteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth amendments, insisted on by the Senate: PROVIDED, That the two articles which by the amendments of the Senate are now proposed to be inserted as the third and eighth articles, shall be amended to read as followeth;

"Article the Third. 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances'.

"Article the Eighth. 'In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defence'.

"AND PROVIDED ALSO, That the first article be amended by striking out the word '*less*', in the last place of the said first article, and inserting in the lieu thereof, the word 'more'.

"On the question, that the House do agree to the alteration and amendment of the eighth article, in the manner aforesaid,

"It was resolved in the affirmative. {AYES 37. / NOES 14.

"The ayes and noes being demanded by one-fifth of the members present,

"Those who voted in the affirmative, are,

Fisher Ames,
Abraham Baldwin,
Egbert Benson,
Elias Boudinot,
John Brown,
Lambert Cadwalader,
Daniel Carroll,
George Clymer,
Benjamin Contee,
Thomas Fitzsimmons,
Abiel Foster,
George Gale,
Nicholas Gilman,
Benjamin Goodhue,
Samuel Griffin,
Thomas Hartley,
Richard Bland Lee,
George Leonard,
James Madison, junior,
Andrew Moore,
Peter Muhlenberg,
Josiah Parker,
George Partridge,
James Schureman,
Thomas Scott,
Joshua Seney,
Roger Sherman,
Peter Silvester,
Thomas Sinnickson,
William Smith, (of Maryland),
William Smith, (of South Carolina),
Michael Jenifer Stone,
George Thatcher,
Jonathan Trumbull,
John Vining,
Alexander White, and
Henry Wynkoop.

"Those who voted in the negative, are,

Theodorick Bland,
Edanus Burke,
Isaac Coles,
William Floyd,
Elbridge Gerry,
Jonathan Grout,
John Hathorn,
James Jackson,
Samuel Livermore,
George Matthews,
John Page,
Jeremiah Van Rensselaer,
Thomas Sumpter, and
Thomas Tuder Tucker.

"On motion,

Resolved, That the President of the United States be requested to transmit to the Executives of the several states which have ratified the Constitution, copies of the amendments proposed by Congress to be added thereto; and like copies to the Executives of the states of Rhode-Island and North-Carolina.

"ORDERED, That the clerk of this House do carry the said resolution to the Senate, and desire their concurrence." Pages 152-3.

Friday, September 25. "A message from the Senate, by Mr. Otis their Secretary.

"Mr. Speaker—The Senate agree to the amendments proposed by this House to their amendments to the several articles of amendment to the Constitution of the United States: And then he withdrew. Page 156.

Monday, September 28. "A message from the Senate by Mr. Otis their Secretary.

"Mr. Speaker—The Senate have agreed to the resolution desiring the President of the United States to recommend a day of general thanksgiving; also to the resolution desiring the President of the United States to transmit to the Executives of the several States in the Union and also to the Executives of the States of Rhode-Island and North-Carolina, copies of the amendments agreed to by Congress to the Constitution of the United States:" * * * "And then he withdrew." Page 158.

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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 606.

UNITED STATES OF AMERICA,
Appellant,

against

WILLIAM H. SPRAGUE and WILLIAM J. HOWEY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

NOTICE OF MOTION AND PETITION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

ARTHUR B. SPINGARN,
JAMES MARSHALL,
Petitioners.

The Hecla Press, 225 Varick St., N. Y. Tel. WAlker 5-1480.

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA, Appellant, against WILLIAM H. SPRAGUE and WILLIAM J. HOWEY, Appellees.	No. 606. Appeal from the District Court of the United States for the District of New Jersey.

Sirs:

PLEASE TAKE NOTICE that upon the argument of the above-entitled cause the undersigned will present to this Court at the Capitol, Washington, D. C., the annexed petition for leave to file a brief herein as *amici curiae*.

Dated, New York, January 8, 1931.

Yours,

ARTHUR B. SPINGARN,
JAMES MARSHALL.

To:

HON. THOMAS D. THACHER,
Solicitor General of the United States.

FREDERIC M. P. PEARSE, Esq.,
Attorney for Appellees,
786 Broad Street, Newark, N. J.

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA, Appellant, against WILLIAM H. SPRAGUE and WILLIAM J. HOWEY, Appellees.	No. 606. Appeal from the District Court of the United States for the District of New Jersey.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Arthur B. Spingarn and James Marshall, pray that they may be permitted to file a brief in the above-entitled cause as *amici curiae*. They are the counsel for National Association for the Advancement of Colored People, a corporation organized under the Membership Corporation Law of the State of New York. Among the objects of the Association are the following:

> "to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

The United States District Court for the District of New Jersey has quashed the indictment herein on the ground that the Eighteenth Amendment to the Constitution of the United States was not validly adopted. The Court argued that the submission by Congress of the Eighteenth Amendment to the Legislatures of the several States for ratification constituted "an abuse of discretion

on the part of Congress in its capacity as an administrative agent." It was held that Congress should have submitted the proposed amendment to conventions to be held in the several States for the purpose of passing upon the amendment, because the amendment transferred powers from the States to the United States; that in such a contingency Article V of the Constitution looked to the ratification by State conventions as the sole means of ratification, and that the Tenth Amendment to the Constitution, which declared the people to be the reservoir of all powers not expressly delegated to the United States, made it requisite that a constitutional amendment intending to deprive the States or the people of the States of their inherent powers must be approved by the people themselves and not by their Legislatures.

The Negro citizens of this country have an important stake in this decision. If it is true that the Eighteenth Amendment was not constitutionally adopted because the surrender of State powers to the Federal Government could only be accomplished by action of State conventions, then it might similarly be argued that the Thirteenth, Fourteenth and Fifteenth Amendments were unconstitutionally adopted. These three amendments likewise involved the surrender of State powers to the Federal Government.

The Thirteenth Amendment, abolishing slavery, the Fourteenth Amendment, requiring due process of law on the part of the States and imposing a penalty upon such States as failed to recognize the rights of the newly emancipated Negroes, and the Fifteenth Amendment, which guaranteed the right to vote, were all adopted in the same manner as the Eighteenth Amendment.

The Solicitor General has consented to our filing a brief as *amici curiae* herein. The appellees have withheld their consent.

Because of the importance of this question to the colored citizens of this country, because of their interest

in this decision, which transcends the question of the traffic in liquor and relates to those fundamental rights which they attained only as the result of four years of bitter warfare, we deem it desirable to file a short brief which will reflect their views on these subjects, and we therefore respectfully pray for leave to file a brief herein as *amici curiæ*, a copy of which we submit herewith.

And your petitioners will ever pray.

ARTHUR B. SPINGARN,
JAMES MARSHALL,
Petitioners.

Dated, New York, January 5, 1931.

SUPREME COURT OF THE UNITED STATES.

No. 606.—October Term, 1930.

United States of America, Appellant, vs. William H. Sprague and William J. Howey.	Appeal from the United States District Court for the District of New Jersey.

[February 24, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The United States prosecutes this appeal from an order of the District Court (U. S. C., Tit. 18, § 682; Tit. 28, § 345) quashing an indictment which charged appellees with unlawful transportation and possession of intoxicating liquors in violation of § 3 of Title II of the National Prohibition Act (U. S. C., Tit. 27, § 12). That court held that the Eighteenth Amendment by authority of which the statute was enacted has not been ratified so as to become part of the Constitution.

The appellees contended in the court below, and here, that notwithstanding the plain language of Article V, conferring upon the Congress the choice of method of ratification, as between action by legislatures and by conventions, this Amendment could only be ratified by the latter.

They say that it was the intent of its framers, and the Constitution must, therefore, be taken impliedly to require, that proposed amendments conferring on the United States new direct powers over individuals shall be ratified in conventions; and that the Eighteenth is of this character. They reach this conclusion from the fact that the framers thought that ratification of the Constitution must be by the people in convention assembled and not by legislatures, as the latter were incompetent to surrender the personal liberties of the people to the new national government. From this and other considerations, hereinafter noticed, they ask us to hold that Article V means something different from what it plainly says.

In addition they urge, that if there be any doubt as to the correctness of their construction of Article V, the Tenth Amendment removes it.

The District Court refused to follow this reasoning. It quashed the indictment, not as a result of analysis of Article V and Amendment X, but by resorting to "political science", the "political thought" of the times, and a "scientific approach to the problem of government." These, it thought, compelled it to declare the convention method requisite for ratification of an amendment such as the Eighteenth. The appellees do not attempt to justify the lower court's action by the reasons it states, but by resubmitting to us those urged upon that court and by it rejected.

The United States asserts that Article V is clear in statement and in meaning, contains no ambiguity, and calls for no resort to rules of construction. A mere reading demonstrates that this is true. It provides two methods for proposing amendments. Congress may propose them by a vote of two-thirds of both houses, or, on the application of the legislatures of two-thirds of the States, must call a convention to propose them. Amendments proposed in either way become a part of the Constitution "when ratified by the legislatures of three-fourths of the several States or by conventions in three-fourths thereof, *as the one or the other mode of ratification may be proposed by the Congress.*"

The choice, therefore, of the mode of ratification, lies in the sole discretion of Congress. Appellees, however, point out that amendments may be of different kinds, as, *e. g.*, mere changes in the character of federal means or machinery, on the one hand, and matters affecting the liberty of the citizen on the other. They say that the framers of the Constitution expected the former sort might be ratified by legislatures, since the States as entities would be wholly competent to agree to such alterations, whereas they intended that the latter must be referred to the people because not only of lack of power in the legislatures to ratify, but also because of doubt as to their truly representing the people. Counsel advert to the debates in the convention which had to do with the submission of the draft of the Constitution to the legislatures or to conventions, and show that the latter procedure was overwhelmingly adopted. They refer to many expressions in contemporary political literature and in the opinions of this court to the effect that the Constitution derives its sanctions from the peo-

ple and from the people alone. In spite of the lack of substantial evidence as to the reasons for the changes in statement of Article V from its proposal until it took final form in the finished draft, they seek to import into the language of the Article dealing with amendments, the views of the convention with respect to the proper method of ratification of the instrument as a whole. They say that if the legislatures were considered incompetent to surrender the people's liberties when the ratification of the Constitution itself was involved, *a fortiori* they are incompetent now to make a further grant. Thus, however clear the phraseology of Article V, they urge we ought to insert into it a limitation on the discretion conferred on the Congress, so that it will read, "as the one or the other mode of ratification may be proposed by the Congress, as may be appropriate in view of the purpose of the proposed amendment." This can not be done.

The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room for construction and no excuse for interpolation or addition. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Gibbons* v. *Ogden*, 9 Wheat. 1; *Brown* v. *Maryland*, 12 Wheat. 419; *Craig* v. *Missouri*, 4 Pet. 410; *Tennessee* v. *Whitworth*, 117 U. S. 139; *Lake County* v. *Rollins*, 130 U. S. 662; *Hodges* v. *United States*, 203 U. S. 1; *Edwards* v. *Cuba R. Co.*, 268 U. S. 628; *The Pocket Veto Case*, 279 U. S. 655; Story on the Constitution (5th Ed.) § 451; Cooley's Constitutional Limitations (2nd Ed.), pp. 61, 70.

If the framers of the instrument had any thought that amendments differing in purpose should be ratified in different ways, nothing would have been simpler than so to phrase Article V as to exclude implication or speculation. The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.

This Court has repeatedly and consistently declared that the choice of mode rests solely in the discretion of Congress. *Dodge* v. *Woolsey*, 18 How. 331, 348; *Hawke* v. *Smith* (*No. 1*), 253 U. S. 221; *Dillon* v. *Gloss*, 256 U. S. 368; *National Prohibition Cases*, 253 U. S. 350. Appellees urge that what was said on the

subject in the first three cases cited is *dictum*. And they argue that although in the last mentioned it was said that "Amendment *by lawful proposal and ratification*, has become part of the Constitution," the proposition they now present was not before the Court. While the language used in the earlier cases was not in the strict sense necessary to a decision, it is evident that Article V was carefully examined and that the Court's statements with respect to the power of Congress in proposing the mode of ratification were not idly or lightly made. In the *National Prohibition Cases*, as shown by the briefs, the contentions now argued were made, the only difference between the presentation there and here being one of form rather than of substance.

The Tenth Amendment provides,

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Appellees assert this language demonstrates that the people reserved to themselves powers over their own personal liberty, and that the legislatures are not competent to enlarge the powers of the federal government in that behalf. They deduce from this that the people never delegated to the Congress the unrestricted power of choosing the mode of ratification of a proposed amendment. But the argument is a complete *non sequitur*. The Fifth Article does not purport to delegate any governmental power to the United States, nor to withhold any from it. On the contrary, as pointed out in *Hawke v. Smith*, No. 1, *supra*, that Article is a grant of authority by the people to Congress, and not to the United States. It was submitted as part of the original draft of the Constitution to the people in conventions assembled. They deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments. Unless and until that Article be changed by amendment, Congress must function as the delegated agent of the people in the choice of the method of ratification.

The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the states or to the people. It added nothing to the instrument as originally ratified and has no limited and special operation, as is contended, upon the people's delegation by Article V of certain functions to the Congress.

The United States relies upon the fact that every amendment has been adopted by the method pursued in respect of the Eighteenth. Appellees reply that all these save the Eighteenth dealt solely with governmental means and machinery rather than with the rights of the individual citizen. But we think that several amendments touch rights of the citizens, notably the Thirteenth, Fourteenth, Fifteenth, Sixteenth and Nineteenth, and in view of this, weight is to be given to the fact that these were adopted by the method now attacked. *The Pocket Veto Case, supra.*

For these reasons we reiterate what was said in the *National Prohibition Cases, supra*, that the "Amendment by lawful proposal and ratification, has become a part of the Constitution."

The order of the court below is reversed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.